DOCKET

No. 07-371
Title: Brent Taylor, Petitioner
v.
Robert A. Sturgell, Acting Administrator, Federal Aviation Administration, et al.
Docketed: September 19, 2007
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (05-5279)
Decision Date: June 22, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 17 2007	Petition for a writ of certiorari filed. (Response due October 19, 2007)
Oct 11 2007	Order extending time to file response to petition to and including November 19, 2007, for all respondents.
Nov 13 2007	Order further extending time to file response to petition to and including December 7, 2007, for all respondents.
Dec 7 2007	Brief of respondent Fairchild Corporation in opposition filed.
Dec 10 2007	Brief of Federal Respondent in opposition filed.
Dec 18 2007	Reply of petitioner Brent Taylor filed.
Dec 19 2007	DISTRIBUTED for Conference of January 11, 2008.
Jan 11 2008	Petition GRANTED. The brief of petitioner is to be filed on or before Wednesday, February 20, 2008. The brief of respondents is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 30 2008	SET FOR ARGUMENT ON Wednesday, April 16, 2008.
Feb 6 2008	Record received from the U.S.C.A. for the District of Columbia Circuit. (1box)
Feb 20 2008	Joint appendix filed. (Statement of costs filed)
Feb 20 2008	Brief of petitioner Brent Taylor filed.
Feb 26 2008	Brief amicus curiae of American Dental Association filed.
Feb 26 2008	Brief amici curiae of Civil Procedure and Complex Litigation Professors filed.
Feb 27 2008	Brief amici curiae of National Security Archive, et al. filed.
Feb 27 2008	Brief amici curiae of Lavonna Eddy and Kathy Lander filed.
Feb 27 2008	Brief amicus curiae of American Association for Justice filed.
Mar 11 2008	Record for U.S.D.C. for the District of Columbia Circuit is electronically filed.
Mar 19 2008	Brief of respondent Robert A. Sturgell, Acting Administrator, Federal Aviation Administration filed.
Mar 19 2008	Brief of respondent The Fairchild Corporation filed.
Mar 20 2008	CIRCULATED.
Mar 24 2008	Motion for divided argument filed by respondent Robert A. Sturgell, Acting Administrator, Federal Aviation Administration.
Mar 26 2008	Brief amicus curiae of Utah filed. (Distributed)
Mar 31 2008	Motion for divided argument filed by respondent GRANTED.
Apr 7 2008	Reply of petitioner Brent Taylor filed. (Distributed)
Apr 8 2008	Record received U.S.D.C. for the District of Columbia (2 boxes).

Docket No. 07-571

Apr 16 2008 Argued. For petitioner: Adina H. Rosenbaum, Washington, D.C. For respondent Sturgell: Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent The Fairchild Corporation: Catherine E. Stetson, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

71

Supreme Court, U.S.
FILED
SEP 17 2007
OFFICE OF THE CLERK

1

No. 07-371

IN THE
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

MARION C. BLAKEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, AND FAIRCHILD CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL JOHN PANGIA
THE LAW OFFICES OF MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

September 2007

QUESTION PRESENTED

Can a party be precluded from bringing a claim, under a theory of "virtual representation," and thereby denied the due process right to a day in court, when the party had no legal relationship with any party to the previous litigation and did not receive notice of that litigation?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

A. The Federal Circuit Courts Are Split Over Virtual Representation. 5

1. There Is a Division Among the Federal Courts of Appeals Over Whether, for "Virtual Representation" to Apply, There Must Be a Legal Relationship Between the Parties. 6

2. There Is a Division Among the Federal Courts of Appeals Over Whether, for "Virtual Representation" to Apply, the Party to the Second Litigation Must Have Received Notice of and the Opportunity to Participate in the First Litigation. 10

B. The Decision Below Is at Odds With This Court's Precedents. 12

CONCLUSION 14

APPENDIX

Court of Appeals' Decision 1a

District Court's Decision 22a

District Court's Order 37a

TABLE OF AUTHORITIES

CASES

Aerojet-General Corp. v. Askew,
511 F.2d 710 (5th Cir. 1975) 6

Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
193 F.3d 415 (6th Cir.1999) 5, 6, 7

Benson and Ford, Inc. v. Wanda Petroleum Co.,
833 F.2d 1172 (5th Cir. 1987) 7

Dills v. City of Marietta,
674 F.2d 1377 (11th Cir. 1982) 7

EEOC v. Pemco Aeroplex, Inc.,
383 F.3d 1280 (11th Cir. 2004) 7, 8

Gonzales v. Banco Central Corp.,
27 F.3d 751 (1st Cir. 1994) 9, 11, 12

Headwaters v. United States Forest Service,
399 F.3d 1047 (9th Cir. 2005) 9

Herrick v. Garvey,
298 F.3d 1184 (10th Cir. 2002). 2

Hoblock v. Albany County Board of Elections,
422 F.3d 77 (2d Cir. 2005) 5

Irwin v. Mascott,
370 F.3d 924, 930 (9th Cir. 2004) 9

Jaffree v. Wallace,
837 F.2d 1461 (11th Cir. 1988) 7

Klugh v. United States,
818 F.2d 294 (4th Cir. 1987) 7

Martin v. American Bancorp. Retirement Plan,
407 F.3d 643 (4th Cir. 2005) 6, 7

Martin v. Wilks,
490 U.S. 755 (1989) 13

Meza v. General Battery Corp.,
908 F.2d 1262 (5th Cir. 1990) 7

Monfils v. Taylor,
165 F.3d 511 (7th Cir. 1998) 8

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 13, 14

Niere v. St. Louis County,
305 F.3d 834 (8th Cir. 2002) 11

Perez v. Volvo Car Corp.,
247 F.3d 303 (1st Cir.2001) 10, 11

Pollard v. Cockrell,
578 F.2d 1002 (5th Cir. 1978) 6, 7

Richards v. Jefferson County,
517 U.S. 793 (1996) 1, 12, 13

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999) 13

Southwest Airlines Co. v. Texas International Airlines,
546 F.2d 84 (5th Cir. 1977) 7

Tice v. American Airlines, Inc.,
162 F.3d 966 (7th Cir. 1998) 8, 10, 11, 12

Tyus v. Schoemehl,
93 F.3d 449 (8th Cir. 1996) 8, 9

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amendment V 2

5 U.S.C. § 552 2

28 U.S.C. § 1254(1) 2

TREATISE

18A Charles Alan Wright, Arthur R. Miller &
Edward H. Cooper, Federal Practice and Procedure
(2d ed. 2002) 5

INTRODUCTION

The United States has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citations omitted). It is a fundamental due process principle that people's claims should not be resolved by cases to which they were not parties. Despite this principle, the D.C. Circuit below held that plaintiffs can be precluded from bringing claims based on cases to which they were not parties, even where they had no legal relationship with any party to the prior litigation and had not even received notice of that litigation while it was ongoing.

The D.C. Circuit based its decision on the theory that a party can be precluded from bringing a claim if that party was "virtually represented" by a party to a prior case. Although many courts have used the term "virtual representation," the virtual representation doctrine is controversial, and courts of appeals are deeply divided over how they define the term. As the court below noted, "circuits vary widely in their approach" to virtual representation, Pet. App. 7a, with some placing greater emphasis on the due process rights of the litigants and others on the courts' interests in finality and efficiency.

In adopting a theory of virtual representation and finding it satisfied in this case, the D.C. Circuit placed itself squarely in conflict with six other circuits. First, it is in conflict with four circuits in which virtual representation may apply only where the parties to the first and second lawsuits have an express or implied legal relationship such that the party to the first suit was legally accountable to the party to the second suit for the manner in which the litigation was conducted. Second, it is in conflict with at least two circuits in which virtual representation may apply only where the party to the second lawsuit received notice and an opportunity to participate in the first lawsuit. In light of the division among the circuits and the importance of the due process rights at stake, the petition should be granted.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 490 F.3d 965 (D.C. Cir. 2007), and is reproduced in the appendix at 1a. The district court's May 12, 2005, Memorandum Opinion granting Respondents' motions for summary judgment is unreported and is reproduced in the appendix at 22a.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner Brent Taylor brought this action on February 3, 2003, to obtain records he had requested from the Federal Aviation Administration (FAA) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The records relate to a 1935 vintage airplane. Greg Herrick, a member of the Antique Airplane Association of which Taylor is executive director, had previously made a separate FOIA request for records related to the airplane and, after his request was denied, had litigated the case up to the Tenth Circuit, where he lost. *See Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002).

In the present action, the FAA and defendant-intervenor Fairchild Corporation moved for summary judgment, arguing, among other things, that although Taylor was not a party to Herrick's earlier lawsuit, his claims were barred by res judicata.

Fairchild accompanied its motion with a statement of material facts that referred to Herrick as a "close associate of Taylor's." Pet. App. 3a. Neither defendant presented any evidence that Taylor had participated in Herrick's lawsuit or even knew about the case while it was ongoing. Nonetheless, the district court held that Taylor's litigation was barred by res judicata. *Id.* at 22a-23a.

The court of appeals affirmed. The court recognized that litigants are not usually bound by prior suits to which they were not parties, but held that "a nonparty's claim [can be] precluded by a prior suit based upon a particular form of privity known as 'virtual representation.'" *Id.* at 6a. Under that theory, "the party to the prior litigation is treated as the proxy of the nonparty," on the ground that the party adequately represented the nonparty, "with the result that the nonparty is barred from raising the same claim." *Id.*

Noting that "other courts vary widely in their approach" to virtual representation, *id.* at 7a, the court of appeals adopted a five-factor test for determining whether a party is the virtual representative of a party in a later suit. It held that it was necessary (1) for the parties to have the same interests and (2) for the party to the first suit to have adequately represented the party to the second suit. In addition, it held that one of three other factors must be present: (3) a close relationship between the parties, (4) substantial participation in the first litigation by the party to the second litigation, or (5) tactical maneuvering on the part of the party to the second litigation to avoid the preclusive effect of the first litigation. *Id.* at 8a.

With regard to whether Herrick had adequately represented Taylor, the court noted that notice was "ordinarily a key element of due process," *id.* at 12a, but concluded that it was not a necessary condition of virtual representation, expressly acknowledging that it was parting company with the First and Seventh Circuits. *Id.* at 12a-13a. The court found adequate

representation based on Herrick's and Taylor's similar incentives to litigate and Taylor's use of the same attorney as Herrick. The court also held that Herrick and Taylor had an identity of interests because Herrick had substantially the same incentive as Taylor to receive the records. *Id.* at 9a-14a.

Turning to the close-relationship factor, the court held that a legal relationship between the parties was not necessary for a finding that the party to the first suit had been a virtual representative of the party to the second suit. *Id.* at 15a. The court acknowledged that, on this score, it was disagreeing with the Fourth, Fifth, and Sixth Circuits. *Id.* Noting that Herrick had asked Taylor for help restoring his airplane, that Herrick had given Taylor some information he obtained through discovery in his earlier case, and that Taylor did not oppose the characterization of Herrick as his "close associate," the court held that Taylor and Herrick had a close relationship for the purpose of determining whether Herrick had virtually represented Taylor. *Id.* at 15a-16a.

The court did not find that Taylor and Herrick had entered into any agreement or had any discussions about how the first case would be conducted, that they had undertaken any concerted action, or that they had engaged in any communications about the public availability of the requested records before the first case was concluded. Indeed, the court made no finding that Taylor knew about the first case at all before it was over. Nonetheless, having found an identity of interests, adequate representation, and a close relationship between the parties, the court held that the requirements for virtual representation were met and that, even though Taylor was not a party to Herrick's lawsuit, he was precluded from litigating his own FOIA claim. *Id.* at 17a.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit Courts Are Split Over Virtual Representation.

This case raises the question of whether and when a party's claims can be barred based on a theory of "virtual representation." The virtual representation doctrine is "controversial," *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 90 (2d Cir. 2005), "reflect[ing] a tension between competing interests" in fundamental due process rights and judicial efficiency. *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 431 (6th Cir.1999) (en banc) (Moore, J., concurring). "Impatience with repetitive litigation of common issues . . . has enticed some courts to rely on virtual representation in circumstances that go beyond anything that is easily justified," 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4456, at 512 (2d ed. 2002), while others express "doubt whether virtual-representation theory adds anything of value to other theories of 'privity.'" *Id.* (citing *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 970-74 (7th Cir. 1998)).

The term "virtual representation" "illustrates the harm that can be done when a catchy phrase is coined [and] . . . starts being applied to situations far removed from its intended and proper context." *Tice*, 162 F.3d at 970; *see also* 18A Wright, Miller & Cooper, at 512-13 ("There are enough vagrant decisions on the loose to raise genuine concern that, for want of any developed theory, virtual representation will be used to preclude bothersome litigation that instead should be resolved on the merits."). The courts of appeals vary in their application of virtual representation, and the differences in their tests can determine whether litigants will be provided their own day in court.

The decision below highlights and deepens two conflicts between the federal courts of appeals: a conflict over the type of

relationship necessary to sustain virtual representation, and a conflict over whether notice is necessary for virtual representation to apply. Indeed, had this case arisen in any of at least six other circuits—the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits—the result would have been different, and Taylor would have been able to litigate his claim on the merits.

1. There Is a Division Among the Federal Courts of Appeals Over Whether, for "Virtual Representation" to Apply, There Must Be a Legal Relationship Between the Parties.

The court of appeals acknowledged that its decision directly conflicts with decisions of the Fourth, Fifth, and Sixth Circuits, which hold that "only a legal relationship may qualify as a 'close relationship'" for virtual representation purposes. Pet. App. 16a (citing *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005); *Becherer*, 193 F.3d at 424; and *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978)). Whereas the court below held that a legal relationship was not necessary for virtual representation, the Fourth, Fifth, and Sixth Circuits, as well as the Eleventh Circuit, require the party to the first case to be legally accountable to the party to the second for the conduct of the litigation. In contrast, like the D.C. Circuit, the Eighth and Ninth Circuits use multi-factor tests for virtual representation that do not require the parties to the first and second suits to have a legal relationship.

In 1975, the Fifth Circuit held that a person could be bound by a prior suit in which he was not a party "if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975). The circuit quickly made clear, however, that not all relationships can support a finding of virtual representation. In *Pollard v. Cockrell*, it held that "[v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are

accountable to non-parties who file a subsequent suit raising identical issues." 578 F.2d at 1008. As examples of the types of relationships contemplated, the court listed "'estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee.'" *Id.* at 1008-09 (*quoting Southwest Airlines Co. v. Tex. Int'l Airlines*, 546 F.2d 84, 97 (5th Cir. 1977)); *see also, e.g., Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990) (requiring express or implied legal relationship); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (same).

The Sixth Circuit subsequently adopted the same standard, requiring a legal relationship between the parties in which the party to the first suit is accountable to the party to the second. *Becherer*, 193 F.3d at 424 (quoting *Benson and Ford*, 833 F.3d at 1175). Similarly, the Fourth Circuit holds that, for virtual representation to apply, the party to the first suit must be accountable to the party to the second. *Martin*, 407 F.3d at 652; *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987).

In addition, although not cited in the decision below, the Eleventh Circuit, bound by pre-1981 Fifth Circuit cases such as *Pollard*, also recognizes that a legal relationship is necessary for virtual representation, *see Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982), although it has also employed a four-factor test in which the relationship between the parties is one factor. *See Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th.Cir. 1988). In *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287 (11th Cir. 2004), its most recent published decision on virtual representation, the Eleventh Circuit first concluded that there was no virtual representation under the four-factor test, and then applied the *Dills* standard, noting that "if the party to the prior litigation was not legally accountable to the party in the latter,

then virtual representation cannot be present, regardless of any other factor." 383 F.3d at 1289.[1]

In contrast, the Eighth and Ninth Circuits, like the D.C. Circuit below, do not consider a legal relationship between the parties necessary for virtual representation. In *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), the Eighth Circuit noted that the Fourth and Fifth Circuits require an express or implied legal relationship, but stated that it "agree[d] with those courts that give wider use to virtual representation." 93 F.3d at 454-55. The court explained that virtual representation requires "the existence of some special relationship between the parties justifying preclusion," *id.*, but listed a close relationship between the parties as just one of seven factors to be considered in determining whether that special relationship exists. Moreover,

---

[1]Although it does not use the same test as the Fourth, Fifth, Sixth, and Eleventh Circuits, the Seventh Circuit also considers the relationship between the parties dispositive, finding preclusion only if the parties are in privity under a "normal privity analysis." *Tice*, 162 F.3d at 973. In *Tice*, the Seventh Circuit explained that a weakness of virtual representation is that it effectively creates a common-law class action that avoids compliance with Rule 23, and noted that "[t]here would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will." *Id.* at 972-73. Thus, it held that outside the context of a properly certified class action, the parties either must have a formal successor relationship or the party to the second suit must have had notice of the first suit and either participated in or had a legal duty to participate in that suit. *Id.* at 973; *cf. Monfils v. Taylor*, 165 F.3d 511, 521 (7th Cir. 1998) (finding virtual representation where parties had a statutory indemnitor/ indemnitee relationship, and where the bound party had notice of and participated in the first trial).

the Eighth Circuit does not seem to require the close relationship to be one of legal accountability. *Tyus* found that the similarity of claims in the two suits, the fact that there was overlap between some (but not all) of the plaintiffs, and the fact that the attorney in the second case was substituted as counsel in the first case, "suggest[ed], at least partly, that a close relationship exist[ed]" between the parties to the two suits, *id.* at 457, even though none of those factors made the parties to the first litigation accountable to the parties to the second.

Similarly, in *Irwin v. Mascott*, the Ninth Circuit held that although a close relationship between the parties supported a finding of virtual representation, such a relationship was not necessary for virtual representation to apply. 370 F.3d 924, 930 (9th Cir. 2004); *see also Headwaters v. U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) (withdrawing and superseding prior decision and remanding for consideration of the *Irwin* factors). And in *Gonzales v. Banco Central Corp.*, 27 F.3d 751, 762 (1st Cir. 1994), the First Circuit conducted a balancing test for virtual representation that considered whether the parties had a legal relationship, but did not state that whether the parties had such a relationship was dispositive.

None of the facts upon which the D.C. Circuit based its decision demonstrates that Herrick and Taylor had a relationship that made Herrick accountable to Taylor during the course of his litigation for the results of that litigation. Indeed, the facts discussed by the court all relate to Taylor's and Herrick's relationship *after* Herrick's litigation was completed, not to whether they had any relationship while Herrick's lawsuit was ongoing. Because Herrick and Taylor lacked an express or implied legal relationship under which Herrick was accountable to Taylor during the course of his litigation, at least the Fourth, Fifth, Sixth, and Eleventh Circuits would have reached a different conclusion about whether Herrick had virtually

represented Taylor. In those circuits, Taylor would have been permitted to litigate his claims on the merits.

The implications of the division in the circuits over virtual representation go far beyond the FOIA context in which this case arose, deciding, in myriad contexts, whether people who seek to have their rights enforced in court can be barred from obtaining access to the courts and litigating their cases on the merits. As the law currently stands, plaintiffs in some circuits are permitted to litigate the merits of their claims, while plaintiffs in other circuits, who may have the exact same interests and relationship to the parties to a prior case, will have the courtroom door shut before them. The Court should grant review to resolve the conflict among the circuits.

2. There is a Division Among the Federal Courts of Appeals over Whether, for "Virtual Representation" to Apply, the Party to the Second Litigation Must Have Received Notice of and the Opportunity to Participate in the First Litigation.

The court of appeals also acknowledged that its decision conflicts with decisions of the First and Seventh Circuits, "which have treated notice as necessary for a finding of virtual representation." Pet. App. 13a (citing *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir.2001); *Tice*, 162 F.3d at 973). The court below concluded that Herrick had virtually represented Taylor even though the record did not demonstrate that Taylor had notice of or the opportunity to participate in Herrick's litigation while it was ongoing.

In *Perez*, the First Circuit held that the "the doctrine of virtual representation cannot be used to bar the claim of a person who was not a party to the earlier suit unless that person, at the least, had actual or constructive notice of the earlier suit and, thus, a chance to join it." *Perez*, 247 F.3d at 312. According to the court, notice and an opportunity to join are "a bare

minimum" for virtual representation. *Id.*; *see also Gonzales*, 27 F.3d at 761 ("[V]irtual representation will not serve to bar a nonparty's claim unless the nonparty has had actual or constructive notice of the earlier litigation.").

Under the First Circuit's articulation of the notice requirement, the legal relationship required for virtual representation in the Fourth, Fifth, Sixth, and Eleventh Circuits would satisfy the requirement by providing constructive notice. In *Gonzales*, the First Circuit stated that implicit in an express or implied legal relationship in which the party to the first suit is legally accountable to the party to the second is the existence of constructive notice. 27 F.3d at 761; *see also id.* at 761 n.11 ("[T]he formation of the underlying relationship, in and of itself, embodies what amounts to constructive notice of all ensuing litigation."). Thus, like the First Circuit, the Fourth, Fifth, Sixth, and Eleventh Circuits ensure that the litigant to the second case is at least constructively informed of the first case.

The Seventh Circuit also requires evidence of notice (and more) before a judgment can bind a nonparty. In *Tice*, the court held that unless a properly certified class action or formal successor relationship is involved, "there should be some indication not only that the second party was aware that the first litigation was going on and that the earlier litigation would resolve its claims . . . but also that the second party either had participated or had a legal duty to participate." 162 F.3d at 973.

On the other hand, as noted by the D.C. Circuit, Pet. App. 13a-14a, its decision that notice is not necessary for virtual representation is consistent with the Eighth Circuit's decision in *Niere v. St. Louis County*, 305 F.3d 834 (8th Cir. 2002). There, applying Missouri law, the court held that the plaintiffs had been virtually represented by the plaintiffs in a prior lawsuit, although they had not known about that lawsuit and lacked even constructive notice.

Neither the First, the Seventh, nor any other circuit considers notice and an opportunity to join the first litigation sufficient for preclusion to apply. *Cf. Richards*, 517 U.S. at 800 n.5. The First Circuit requires, in addition, a balancing of the equities. *Gonzales*, 27 F.3d at 761. The Seventh requires the party to the second suit to have participated in or had a legal duty to participate in the first suit. *Tice*, 162 F.3d at 973. Yet, contrary to the D.C. Circuit below, both circuits recognize that notice and the opportunity to participate are bare necessities for someone to be bound by a judgment. Because Taylor did not have notice of Herrick's lawsuit while it was ongoing, his case would have been decided differently in a circuit in which notice of the prior litigation is necessary for res judicata to apply.

B. The Decision Below Is at Odds with This Court's Precedents.

Certiorari is also warranted because the decision below is wrong on the merits, deprives Taylor of due process, and will cause future plaintiffs, in a variety of cases, to lose their constitutional right to a day in court.

1. In *Richards v. Jefferson County*, 517 U.S. at 801, this Court held that, absent a sufficient relationship between the parties to the first and second litigation, parties who neither participated in, nor had the opportunity to participate in, earlier litigation cannot be bound by that litigation. In *Richards*, the Court considered whether a challenge to a county tax was barred by a previous case in which other taxpayers had challenged the same tax. Noting that the parties to the first suit "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties," *id.*, the Court found "no reason to suppose that [the court deciding the first case] took care to protect the interests" of the parties to the second case or that the plaintiffs in the first case "understood their suit to be on behalf of absent

county taxpayers." Because the parties to the two suits were "mere 'strangers'" to each other, *id.* (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)), the Court held that due process prevented the party to the second suit from being bound by the prior litigation. *Id.*; *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (holding that plaintiffs in the second case were "strangers" to plaintiffs in the first case and therefore that, "for the reasons [] explained in *Richards*, they cannot be bound by the earlier judgment").

The court of appeals stated that it did not read *Richards* to require that special procedures be followed in the first suit or that the party to the first suit have understood it was representing the nonparty, Pet. App. 7a, and found Herrick's and Taylor's relationship sufficient to support virtual representation. *Id.* at 16a-17a. However, like in *Richards* and *South Central Bell*, Herrick and Taylor are strangers in a legal sense, albeit not in a colloquial one. Herrick is not legally accountable to Taylor for the results of the first litigation, and their relationship would not have led Taylor to expect to be precluded by Herrick's lawsuit. *See South Central Bell*, 526 U.S. at 168. And the record contains no evidence about Taylor's and Herrick's relationship during the course of Herrick's litigation, when, according to the court below, Herrick had been virtually representing Taylor. Because Herrick and Taylor do not share a "special *representational* relationship," *id.* (emphasis added), due process prevents Taylor from being bound by Herrick's litigation.

2. The decision below also deprives Taylor of due process by holding him bound by a judgment when he had no notice of the litigation. This Court has recognized that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Accordingly, an "elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* Nonetheless, the court of appeals held that notice was unnecessary for virtual representation and barred Taylor from litigating his claim even though he had not received notice of the prior litigation and did not have a relationship with Herrick such that Herrick's knowledge of the lawsuit constituted constructive notice of Taylor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Adina H. Rosenbaum
Brian Wolfman
Counsel of Record
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Michael John Pangia
THE LAW OFFICES OF
MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20009
(202) 955-6450

September 2007 — Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 2, 2007 Decided June 22, 2007

No. 05-5279

BRENT TAYLOR,
APPELLANT

V.

MARION C. BLAKEY,
ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION AND
FAIRCHILD CORPORATION,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 03cv00173)

Before: GINSBURG, *Chief Judge*, and GRIFFITH, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: Brent Taylor requested certain documents from the Federal Aviation Administration under the Freedom of Information Act. The FAA denied his request and Taylor sued to compel disclosure. The district court dismissed the case, holding res judicata barred Taylor's claim because Greg Herrick, a "close associate" of Taylor's, had been his "virtual representative" in a prior FOIA case Herrick had

brought unsuccessfully seeking the same documents. We affirm that judgment.

I. Background

Herrick, a member of the Antique Aircraft Association (AAA) and the owner of an F-45 aircraft manufactured by a predecessor of the Fairchild Corporation, filed a request under the FOIA seeking the plans and specifications for the F-45. *Herrick v. Garvey*, 298 F.3d 1184, 1188 (10th Cir. 2002). After conferring with Fairchild, the FAA determined the requested material was a trade secret and withheld the information pursuant to Exemption 4 of the FOIA. *See* 5 U.S.C. § 552(b)(4). Herrick challenged the FAA's determination, pointing to a 1955 letter from Fairchild's predecessor authorizing the government to disclose the information to the public. *Herrick*, 298 F.3d at 1193-94. The United States District Court for the District of Wyoming granted summary judgment to the FAA. The Tenth Circuit Court of Appeals, affirming, *id.* at 1194-95, opined that Fairchild's letter authorizing disclosure had deprived the F-45 documents of their status as a trade secret but, because Herrick had not challenged on appeal the district court's assumption that Fairchild's later revocation of that authorization restored their status as a trade secret, the Tenth Circuit assumed without deciding that revocation would have such an effect. *Id.* at 1194 n.10.

Approximately one month after the Tenth Circuit issued its decision in *Herrick*, Taylor, the executive director of the AAA, filed a FOIA request for the same documents relating to the F-45 that Herrick had sought. After failing to receive a response from the FAA's Production and Airworthiness Division, Taylor, represented by the lawyer who had represented Herrick in his litigation, appealed the constructive denial to the FAA's FOIA Program Manager, noting the decision in *Herrick* and arguing the trade secret status of the

F-45 documents, having long been abandoned, could not be restored. The FAA nonetheless withheld the material under Exemption 4 and Taylor, still represented by Herrick's counsel, sought review in the district court.

Taylor filed a motion for discovery and a memorandum in support thereof, in which he said that Herrick "has now requested [Taylor] to assist him with the repair of his aircraft." The district court denied the motion as premature, preferring to wait until the Government moved for summary judgment before determining whether discovery was appropriate in this case. Fairchild then successfully moved to intervene as a defendant, after which Fairchild and the FAA moved for summary judgment, contending, among other things, that Taylor was precluded by the doctrine of res judicata from bringing this claim because he had been "virtually represented" by Herrick in the litigation in the Tenth Circuit.

Fairchild accompanied its motion with a statement of undisputed material facts that identified Herrick as a "close associate of Taylor's." In his opposition to summary judgment Taylor did not challenge this characterization and acknowledged he and Herrick were both members of the same antique aircraft association and shared a common interest in preserving antique aircraft. He did suggest, however, that such commonalities were insufficient to warrant preclusion of his claim, and added that he did not know of Herrick's FOIA request until after the Tenth Circuit's decision. Also, he said Herrick and Taylor sought the information for different reasons — Herrick to restore his F-45 and Taylor more generally "for the public and in the interest of the preservation of antique aircraft heritage."

The district court entered a summary judgment for the FAA and Fairchild. Noting Taylor's failure to present any evidence in opposition, and apparently assuming Taylor had agreed to

Herrick's request for assistance mentioned in Taylor's motion for discovery, the court concluded it was

> left with two individuals who are quite fond of antique aircrafts and the historical preservation thereof, who are members of the same antique aircraft association, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and Taylor has agreed to repair.

(footnotes omitted). The court also noted that this case involves a matter of public law, which, because multiple parties could raise the same claim, it believed weighed in favor of finding the claim precluded. Applying the seven-factor test for virtual representation announced by the Eighth Circuit in *Tyus v. Schoemehl*, 93 F.3d 449 (1996), the court held Herrick indeed had been Taylor's virtual representative. Accordingly, the court dismissed the case as barred by res judicata.

Taylor moved for reconsideration and filed, for the first time, an affidavit. In the affidavit he stated that he did not have an agreement with Herrick to restore Herrick's F-45 and that he had hired Herrick's lawyer because of his knowledge of the issues and because hiring another attorney "would not have been cost effective and would have taken too much time." The attorney also submitted an affidavit stating there was no agreement between Taylor and Herrick to rebuild Herrick's F-45. The district court denied reconsideration and Taylor appealed.

II. Analysis

Under the doctrine of res judicata, or claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same

cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002). Res judicata bars relitigation both of "issues that were" and of issues that "could have been raised" in the prior action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Drake*, 291 F.3d at 66. Our review of the district court's application of the doctrine is de novo. *Ibrahim v. Dist. of Columbia*, 463 F.3d 3, 7 (D.C. Cir. 2006).

Taylor contends *Herrick* does not preclude his claim here because (1) he is not in privity with Herrick, (2) there was no final judgment on the merits in *Herrick*, and (3) his claim is different from Herrick's. Taylor also claims (4) the district court erred in denying his motion for discovery. The Government and Fairchild argue (1) dismissing the case as a res judicata was appropriate and, (2) in the alternative, the requested documents are protected from disclosure under Exemption 4. We conclude the claim is barred as a res judicata and do not reach the other issues briefed by the parties.

A. Virtual Representation

Although a litigant is not ordinarily bound by the judgment in a prior suit to which he was not a party, "there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). Privity is an "elusive concept, without any precise definition of general applicability." *Jefferson Sch. of Soc. Sci. v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963); *see also* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4449 at 351 (2d ed. 2002) ("the privity label simply expresses a conclusion that preclusion is proper"). At one time courts tended not to find two parties in privity absent a specific legal relationship between them, but the term "is now used to describe various relationships between

litigants that would not have come within the traditional definition of that term." *Richards*, 517 U.S. at 798.

Courts now generally hold a nonparty's claim precluded by a prior suit based upon a particular form of privity known as "virtual representation." The idea is that some cases of successive litigation involve as a litigant "a nonparty [to the original action] whose interests were adequately represented by a party to the original action." *Tyus*, 93 F.3d at 454; *cf. Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) ("[I]n certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party"). In those cases the party to the prior litigation is treated as the proxy of the nonparty, with the result that the nonparty is barred from raising the same claim. At this level of generality, the doctrine is not controversial. *See Tice v. Am. Airlines, Inc.* 162 F.3d 966, 971 (7th Cir. 1998); *see also Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 758 & n.5 (1st Cir. 1994).

In what circumstances were a person's interests "adequately represented" by another person? The Court explicated the meaning of "adequate representation" in *Richards* where, after assuming that "in some class suits adequate representation [of nonparties] might cure a lack of notice," 517 U.S. at 801, it concluded that for a prior proceeding to have "binding effect on absent parties," the court must "insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* (quoting *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)). In *Richards* there was no reason to believe the court in the prior case had taken care to protect the interests of the later plaintiffs or that the plaintiffs in the prior case "understood their suit to be on behalf" of the *Richards* plaintiffs; the litigants were "best described as mere 'strangers' to one another." *Id.* at 802. In that circumstance res judicata would be inconsistent

with due process. *Id.*

Richards suggests both that identical interests and adequate representation are necessary conditions for virtual representation, and that there must be some relationship between the litigant and his putative proxy, *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). We do not, however, read *Richards* to hold a nonparty was adequately represented only if special procedures were followed or the party to the prior suit understood it was representing the nonparty; those circumstances tend to support a finding of adequate representation, but there is no reason to believe they are the only circumstances in which res judicata is consistent with due process. *Cf. Tyus*, 93 F.3d at 455.

This court has not had a prior occasion to apply the doctrine of virtual representation, and we see that other circuits vary widely in their approach to the doctrine. *See Gonzalez*, 27 F.3d at 761. For example, the Fourth Circuit treats a party as a virtual representative only if the party is "accountable to the nonparties who file a subsequent suit" and has "the tacit approval of the court" to act on the nonparty's behalf. *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987). Regarding "tacit approval," the court cited the RESTATEMENT (SECOND) OF JUDGMENTS § 36(1), cmt. b (1982), according to which "[t]he essential question is whether there is a disclosed relationship in which the party is accorded authority to appear as a party on behalf of others." *Id.*; *see Martin v. Am. Bancorp. Retirement Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005). In contrast, the Eighth Circuit notes that "[d]ue to the equitable and fact-intensive nature of virtual representation, t[illegible]e is no clear test for determining the applicability of the doctrine," but has identified several factors to consider: whether the successive party (1) has an identity of interests with the prior party; (2) has a close relationship with the prior party; (3) participated in the prior litigation; (4) apparently acquiesced in being bound by the

prior litigation; (5) was adequately represented, viewed in terms of the prior party's incentive to litigate; (6) deliberately maneuvered to avoid the effects of the prior action; and (7) raises a public or a private law issue, the former of which is more conducive to a finding of virtual representation. *Tyus*, 93 F.3d at 455-56. The district court applied *Tyus* in determining that Herrick had been Taylor's virtual representative. *See also Am. Forest Res.Council v. Shea*, 172 F. Supp. 2d 24, 32 (D.D.C. 2001) (applying same test).

An appropriate test for virtual representation must consider and balance competing interests in due process and efficiency. Too readily to find virtual representation risks infringing upon the nonparty's right to due process of law and departs from our "deep-rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U.S. at 798. To find virtual representation under only very narrow circumstances, on the other hand, would expose defendants to the burden of relitigation, raise the possibility of inconsistent results, and compromise the public interest in judicial economy. *See Parklane*, 439 U.S. at 326; *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981). We believe these competing concerns can best be addressed by considering five factors in a test similar to that used by the Ninth Circuit in *Irwin v. Mascott*, 370 F.3d 924, 930 (2004). Like the Ninth Circuit, we believe identity of interests and adequate representation are necessary conditions. We do not, however, believe they are sufficient — a point to which our sister circuit did not speak. We therefore require in addition a showing of at least one of the other factors the Ninth Circuit identified as supporting virtual representation: a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment. As this approach clarifies, there can be no virtual representation absent an affirmative link between the later litigant and either the prior

party or the prior case. Decisions finding virtual representation have often applied the factors we adopt today, *see* 18A WRIGHT ET AL., *supra*, § 4457 at 521-28 (collecting cases), and the parties generally agree they are appropriate factors to consider.*

In determining whether Herrick served as Taylor's virtual representative, we base our conclusion upon the relevant circumstances as of the time summary judgment was entered. *See, e.g., Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987).

1. Identity of Interests

Taylor seeks the same result as did Herrick, namely, release of the F-45 documents. To establish the identity of their interests, however, it is necessary to show not just that they wanted the same result but also that Herrick had substantially the same incentive to achieve it. *See Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995). A party who is less than zealous in pursuing his case is not an effective representative of a more committed party in a successive suit. *See Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 142 F.3d 468, 474 (D.C. Cir. 1998). Here, the evidence is that Herrick and Taylor had substantially the same incentive. Taylor concedes he shares

---

* The FAA contends that because Taylor did not argue against use of the *Tyus* factors in the district court, but argued only that Herrick should not be considered his virtual representative pursuant to those factors, he has forfeited his present argument that the *Tyus* test is overly broad. Taylor's objections to the district court's interpretation of the record in light of *Tyus*, however, carry over to the extent we consider several of those same factors pursuant to the variant of *Irwin* we adopt today.

Herrick's interest in the preservation of antique aircraft as a general matter. Taylor also admitted, in his request for discovery, that Herrick had asked him to assist with the restoration of Herrick's F-45. Although the district court erred in stating at summary judgment that Taylor had agreed to help restore the aircraft, there was still evidence that Herrick and Taylor had the same motivation to obtain the documents, viz., the restoration of Herrick's F-45. In the absence of any contrary evidence, *see, e.g.*, *Bias v. Advantage Intern., Inc.*, 905 F.2d 1558, 1561 (D.C. Cir. 1990) ("Once the moving party has carried its burden ... [t]he nonmoving party 'must come forward with specific facts showing that there is a *genuine issue for trial.*'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (internal quotation mark omitted)), such as an opposing affidavit, the district court correctly found their interests were identical.

Taylor points out that he alleged in his opposition to summary judgment that he sought "the information for the public and in the interest of the preservation of antique aircraft heritage"; contends the admission that Herrick had asked him to help restore Herrick's aircraft was an erroneous statement made by his counsel; and claims he did not need to file an affidavit correcting the error because neither the FAA nor Fairchild had identified Herrick's supposed request as an undisputed material fact. Taylor's statement in his motion for discovery, however, may be treated as an "admission[] on file," FED.R.CIV.P. 56(c); *see also Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) (representation in brief may be treated as admission on file); *United States v. One Heckler-Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir. 1980); 10A WRIGHT ET AL., *supra* § 2722 at 375-76, § 2723 at 389-91 (3d ed. 1998); and Fairchild's motion for summary judgment did identify that statement as evidence of a close relationship between Taylor and Herrick. Taylor therefore had notice of its potential use by the district court, yet made no effort to correct

the error until after the court had entered judgment against him.* Taylor responds that a statement in a memorandum of law should not be treated as evidence, citing *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996), but that case involved a factual assertion by the plaintiff offered in support of his claim, *id.*, and thus is relevantly different from the statement against interest at issue here. *Cf. Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 734 (D.C. Cir. 2003) (pleadings are "admissible as evidence in support of ... opponent's cause").

In any event, the distinction Taylor draws between his interest in the preservation of antique aircraft and Herrick's is not helpful to his cause. Herrick's specific interest in the restoration of his F-45 gave him, if anything, a stronger incentive to litigate than Taylor's general interest in public disclosure and the "preservation of antique aircraft heritage."

2. Adequate Representation

Following the Eighth Circuit in *Tyus*, the district court analyzed whether Taylor's interest had been adequately represented in *Herrick* in terms of Herrick's incentive to litigate, which we have treated above as part of the identity of interests analysis. Finding adequate representation based solely upon incentives would be insufficiently protective of the nonparty's right to due process. *See Richards*, 517 U.S. at 801;

---

* Furthermore, Taylor's post-summary judgment affidavit does not actually correct the statement made in the admission; it only states that he had no agreement with Herrick to restore his F-45, not that Herrick had not asked for his assistance. This is perhaps understandable given the district court's erroneous statement that there was an agreement, but one would think Taylor would have taken care at that point to disavow as much of a relationship with Herrick as he could do.

Tyus, 93 F.3d at 458-59 (Henley, J., concurring in result); 18A WRIGHT ET AL., *supra*, § 4457 at 548-49; *cf. Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1054 (9th Cir. 2005) (adequate representation aspect of *Irwin* test "subsumes *Richards*'s due process requirements").

Notice is ordinarily a key element of due process, *see, e.g.*, *Richards*, 517 U.S. at 799-800, but it is neither a sufficient nor a necessary condition of adequate representation. To deem notice sufficient would in effect transform permissive into mandatory intervention in judicial proceedings, a step the Supreme Court rejected in *Wilks*. 490 U.S. at 762-63; *see also S. Cent. Bell*, 526 U.S. at 168. On the other hand, were notice deemed necessary to virtual representation — a question pointedly left open in *Richards*, 517 U.S. at 801 — a close associate of the prior party, with identical interests, could relitigate a claim that was zealously but unsuccessfully tried to judgment and that, even if he had received notice of and intervened in the prior case, would have proceeded in the same way.*

To be sure, an opportunity to participate in the first case is valuable, and is part of the reason we conclude virtual representation requires, in addition to an identity of interests and adequate representation, some tie to the prior case or the prior party. But unlike the First and Seventh Circuits, which

---

* Indeed, even if intervention by that close associate might have changed the strategy or tactics of counsel in the first case, that does not necessarily demonstrate the representation was inadequate. *Cf. Strickland v. Washington*, 466 U.S. 668, 688-90 (1984) ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

have treated notice as necessary for a finding of virtual representation, *see Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir. 2001); *Tice*, 162 F.3d at 973; *cf. Headwaters*, 399 F.3d at 1055 (reversing sua sponte dismissal as a res judicata and remanding for determination of facts relevant to privity, noting in part "there is no way to determine whether the adequate representation/due process requirements ... were met here. We do not know whether Headwaters had notice of the earlier suits while they were pending."), and like the Eighth Circuit in *Niere v. St. Louis County*, 305 F.3d 834, 837-38 (2002) (determining plaintiffs, under Missouri law, had been virtually represented in prior state court action of which they had no notice), we see no reason to treat notice as anything more or less than an important consideration.

The district court concluded Taylor apparently had notice of Herrick's litigation based primarily upon their shared interest in antique aircraft, their common membership in the AAA, their use of the same lawyer for their respective cases, Herrick's sharing with Taylor the information he obtained through discovery, and his request that Taylor assist in the restoration of his F-45.* As Taylor and the amicus note, however, these facts do not show that Taylor had notice of Herrick's lawsuit while it was ongoing.** We turn to other indicia, therefore, to

---

* To be precise, the district court concluded from these facts that Taylor had apparently acquiesced in being bound by Herrick's litigation, but consent necessarily entails notice.

** Taylor and the amicus also note that even if Taylor had notice of Herrick's litigation, he could not have joined it because he had not yet filed a FOIA request for and been denied the F-45 documents. Taylor's not yet having sought the documents, however, is equally consistent with his having decided independently to seek the same information under the

determine whether Taylor was adequately represented by Herrick.

First, Herrick had an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than, Taylor's. Although not dispositive for the reason given before, it is eminently reasonable to believe an individual with a strong incentive to litigate a particular matter, by defending his own interest adequately represents others with the same interest. Second, Herrick and Taylor used the same attorney to pursue their FOIA claims. Although use of the same counsel in itself is hardly dispositive, *see S. Cent. Bell*, 526 U.S. at 167-68, in combination with an identity of interest it is surely relevant, *see, e.g.*, *Irwin*, 370 F.3d at 931; *see also Ruiz v. Comm'r of Dep't of Transp. of the City of New York*, 858 F.2d 898, 903 (2d Cir. 1988), because, unless explained away by some unusual circumstance, it strongly suggests satisfaction with the attorney's performance in the prior case. We therefore conclude that, in Taylor's own view, counsel provided adequate representation of Herrick, and by extension, of Taylor himself, in Herrick's case. *See Irwin*, 370 F.3d at 391.*

3. Close Relationship

FOIA and his having cooperated with Herrick to give themselves a second chance if the first challenge failed. The latter scenario would be indicative of virtual representation but on this record we can draw no inference as to which more likely occurred.

* The affidavit Taylor submitted with his motion for reconsideration to explain his choice of counsel, *see* p. 5 above, because it was submitted after the entry of summary judgment, is not part of the res judicata determination in this case.

Taylor acknowledges he and Herrick know each other, have a common interest in the preservation of antique aircraft, and belong to many of the same aviation associations. In his view, however, a close association for res judicata purposes is a relationship like that between family members or business partners — the examples we mentioned in *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1411 n.8 (1985). Amicus Public Citizen relatedly posits the relationship must be one such that Herrick would have understood he was representing Taylor in the first lawsuit or would have "made a special effort to represent Taylor's interests." *See, e.g., Martin*, 407 F.3d at 651-52; *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 424 (6th Cir. 1999) (en banc); *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978).

Unlike the courts just cited, we do not believe that only a legal relationship may qualify as a "close relationship." Whether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question. *See Chase*, 56 F.3d at 346. This is a case in point. Contrary to Taylor's argument, the record before us indicates Herrick and Taylor were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well: Herrick asked Taylor to assist him in restoring his F45, provided information to Taylor that Herrick had obtained through discovery, and at summary judgment Taylor did not oppose Fairchild's characterization of Herrick as his "close associate." Taylor argues he did not do so because he assumed the phrase meant only that "they know each other and belong to many of [the] same aviation associations" and because he did not understand it to "imply [they] were close associates *prior* to Taylor's FOIA request." In fact, however, both the Government and Fairchild invoked Taylor's close relationship to Herrick as evidence indicative of privity; Taylor therefore knew the point of Fairchild's characterization, yet his only

response was to say "mere common membership does not create power in on[e] member to represent others." In light of these facts, and the complete lack of any evidence submitted by Taylor in opposition, we conclude Taylor and Herrick were in a "close relationship" for the purpose of determining whether Herrick was Taylor's virtual representative in the prior litigation.

4. Tactical Maneuvering

Tactical maneuvering by the second litigant, which in this context means conduct "designed unfairly ... to obtain multiple bites of the litigatory apple," *Gonzalez*, 27 F.3d at 761, is indicative of virtual representation. Amicus Public Citizen alone appears to take issue with any consideration of such maneuvering, saying, "it puts the cart before the horse to base privity on a finding of tactical maneuvering ...[;] Taylor can only be found to have engaged in improper maneuvering if he was *already* in privity with Herrick." At least some forms of tactical maneuvering, however, are probative of collusion or otherwise indicative of privity and therefore should be considered a factor supporting virtual representation. *See, e.g.*, *Tyus*, 93 F.3d at 457 (plaintiffs in ongoing suit filing second suit and adding several new plaintiffs considered tactical maneuvering); *Pedrina v. Chun*, 97 F.3d 1296, 1299, 1302 (9th Cir. 1996) (certain plaintiffs in federal court, having brought and lost state court action over same transaction, held virtual representatives of newly-added plaintiffs).

In this case, Taylor filed his FOIA request for the F-45 documents almost immediately after the Tenth Circuit decided *Herrick* and, in filing his administrative appeal with the FAA three months later, Taylor used information Herrick had obtained through discovery in that case. Taylor's filing on the heels of a court decision affirming the government's position with the assistance of the losing party to the prior litigation

suggests Herrick and Taylor coordinated the filing of Taylor's request — and the litigation that would almost certainly follow — so that Taylor could try where Herrick had failed, to the benefit of both. As Taylor correctly notes, however, these facts do not necessarily show collusion to avoid the preclusive effects of *Herrick*; for example, Taylor could have read about *Herrick* and acted on his own to file an identical FOIA request, and passing along documents obtained through discovery is something Herrick might have done even for someone with whom he was not in cahoots. In view of the ambiguity of the facts, and because we do not need to determine whether they count as tactical maneuvering, we do not do so.

To review the bidding, there is record evidence that: (1) Taylor and Herrick had identical interests, even when viewed in terms of incentives, and (2) Taylor's interest was adequately represented in *Herrick*, in addition to which (3) Herrick and Taylor had a close working relationship relative to these successive cases. There is no countervailing evidence. We therefore conclude Herrick served as Taylor's virtual representative in the litigation for the F-45 documents.

Taylor complains that finding virtual representation upon these facts effectively bars anyone from bringing a legal challenge to the issue specifically left open in *Herrick*; a later plaintiff would have to "prove he is a total stranger to Mr. Herrick and Mr. Taylor and has no 'interest' in the documents." Relatedly, Taylor and Public Citizen suggest it is particularly inappropriate to find virtual representation in a FOIA case because every individual has the right to receive nonexempt government information regardless whether another person previously requested and was denied the same information. Moveover, because many filers of FOIA requests are reporters, public interest organizations, and academics, who are likely to associate with others having similar interests, the purpose of the FOIA would be disserved if those filers were precluded by res

judicata from making successive requests. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("the identity of the requesting party has no bearing on the merits of his or her FOIA request").

The facts of this case simply do not implicate those concerns, however. The record here, as we have noted, contains evidence suggestive of identical interests, adequate representation, and a close relationship and no evidence to the contrary. Matters might look different if Taylor had submitted evidence before summary judgment explaining, for example, why their common counsel's representation of Herrick did not adequately represent Taylor's interests, or demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations, or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents. He did not do so, however, with the result that the record supports finding Herrick and Taylor in privity.

B. Judgment on the Merits

For the purpose of claim preclusion, a final judgment on the merits "is one that actually pass[es] directly on the substance of [a particular] claim before the court," *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001) (alteration in original) (internal quotation marks omitted), as distinguished from one that addresses "mere matters of practice, procedure, jurisdiction, or form." *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981) (quoting *Fairmont Aluminum Co. v. Comm'r*, 222 F.2d 622, 625 (4th Cir. (1955)). A final judgment on the merits of a claim precludes "relitigating issues that were or could have been raised in [the prior] action." *Allen*, 449 U.S. at 94.

In *Herrick* the court ruled upon the plaintiff's legal right to

the documents he sought under the FOIA, 298 F.3d at 1194-95; the court's judgment, therefore, is a final judgment on the merits. Taylor argues it is not because the court assumed without deciding two issues necessary to the judgment, namely, that (1) Fairchild could restore trade secret status to the documents at issue by revoking its permission to disclose them; and (2) Fairchild had in fact revoked its permission. We fail to see why this matters. The Tenth Circuit clearly decided Herrick's legal right to the F-45 documents. If *Herrick* is not a final judgment on the merits, then Herrick himself could relitigate the case, a risible proposition. *See, e.g., Allen*, 449 U.S. at 94.

C. Same Cause of Action

Taylor's claim is the same as Herrick's claim for the purpose of res judicata if they share a common "nucleus of facts." *See Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004); *Drake*, 291 F.3d at 66. The key factors in making this determination are "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Apotex*, 393 F.3d at 217.

Herrick and Taylor requested the same documents from the same government agency and got the same negative response. Taylor nonetheless argues the factual backdrop of his claim differs from that of Herrick's claim because his FOIA request and challenge came after *Herrick* was decided and was based upon the Tenth Circuit's holding "that Exemption 4 has not applied to the subject documents since 1955." Putting aside the question whether the court so "held," Taylor's point is that he had to make a different legal argument for disclosure, namely that the trade secret status of the documents he sought could not be restored, whereas Herrick had argued Fairchild was not the

owner of the documents and therefore had no authority to revoke the letter that had authorized the government to disclose the F45 documents to the public. As the Government and Fairchild point out, however, a different legal theory does not by itself demonstrate a difference in the nucleus of facts. *See Apotex*, 393 F.3d at 217-18. Indeed, in this case the relevant facts are identical to those in *Herrick*.

In his reply brief, Taylor suggests for the first time that the nucleus of facts in the two cases may be different because the records maintained in the requested file may have changed since Herrick made his request. *See Negley v. FBI*, 169 Fed. Appx. 591, 594 (D.C. Cir. Jan. 17, 2006) ("FOIA does not limit a party to a single request, and because the records maintained by an FBI office may change over time, a renewal of a previous request inevitably raises new factual questions"). An argument first made in a reply brief is ordinarily deemed forfeit, *see Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000), and we have no reason to depart from that rule in the present case. *Cf. Natural Res. Def. Council, Inc. v. EPA*, 25 F.3d 1063, 1072 n.4 (D.C. Cir. 1994) (exception "properly granted only for arguments questioning the court's jurisdiction ... or where a 'manifest injustice' might result from ... failure to reach an argument").

III. Conclusion

For a party to be deemed the "virtual representative" of a party to a later suit making the same claim, the two parties must have the same interests and those interests must have been adequately represented in the first litigation. In addition, there must be a close relationship between the two, or the new party must have participated substantially in the prior litigation or engaged in tactical maneuvering to avoid the preclusive effects of the first decision.

In this case the record before the district court at summary judgment indicated Herrick and Taylor had identical interests in obtaining the F-45 documents, which interests were adequately represented in Herrick's litigation; and they were close associates. The district court therefore did not err in holding the two were in privity.

Taylor has raised the same claim as had Herrick, and the Tenth Circuit's decision in Herrick's case was clearly a final judgment on the merits. The requirements for res judicata are therefore satisfied, and the decision of the district court is accordingly

Affirmed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR,	:	
Plaintiff,	:	Civil Action No.:
	:	03-0173 (RMU)
v.	:	
	:	Document Nos.: 27, 29
MARION BLAKEY,	:	
Administrator, Federal	:	
Aviation Administration *et al*	:	
Defendants.	:	

MEMORANDUM OPINION

GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the court on defendant Federal Aviation Administration's ("FAA") motion to dismiss or, in the alternative, for summary judgment, and defendant-intervenor Fairchild Corporation's ("Fairchild") motion for summary judgment. The plaintiff, Brent Taylor, brings suit against the FAA pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking design specifications for the Fairchild F-45 ("the F-45"), an antique aircraft. The defendants argue that res judicata bars this case because Greg Herrick litigated and lost an identical FOIA request in *Greg Herrick v. Jane Harvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002). The court holds that, because Herrick and Taylor share, among other things, identical interests and a close relationship, Herrick was Taylor's "virtual representative" in *Herrick v. Harvey* so as to prelude the instant case. Accordingly, the court grants summary judgment to the

defendants. Furthermore, because this case clearly violates res judicata principles, the court orders the plaintiff to show cause why he and his lawyer should not be required to pay the attorney's fees that the defendants incurred in this litigation.

II. BACKGROUND[1]

The plaintiff is a mechanic who restores vintage aircraft. Def.-Intervenor Fairchild's Statement of Material Facts ("Fairchild's Statement") ¶ 1. He is also the president of the Antique Airplane Association, which is dedicated to the preservation of vintage aircraft and aviation heritage. Compl.

---

[1] The plaintiff did not submit a statement of disputed material facts in his opposition to the defendants' motions. There is no question, however, that the plaintiff (who has counsel in this case) is aware of and attempting to oppose summary judgment. *E.g.*, Opp'n at 2 (noting that there are genuine issues of material fact), 3 (noting a "new unresolved issue of fact before the court"), 8 (same). Although the FAA did submit a motion to dismiss, or in the alternative, for summary judgment, Fairchild's motion was only for summary judgment. Thus, at the very least, the plaintiff has failed to respond appropriately to Fairchild's motion. LCvR 7(h) (stating that oppositions to motions for summary judgment "shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issues necessary to be litigated"). Furthermore, the plaintiff fails to provide with his opposition any affidavits or other supporting materials. FED. R. CIV. P. 56(e). Because the plaintiff fails to submit a statement of disputed facts, "the court may assume the facts identified by the moving party in its statement of material facts are admitted." LCvR 7(h). Accordingly, the court will freely cite to Fairchild's statement of material facts.

¶ 2. In August 2002, the plaintiff wrote to the FAA requesting information (including plans, blueprints, specifications, engineering drawings and other data) concerning a 1935 F-45 aircraft manufactured by the Fairchild Engine and Airplane Corporation ("FEAC"), a predecessor entity of Fairchild. Fairchild's Statement ¶ 9.[2] FEAC produced about twelve F-45aircraft and only two survive. Pl.'s Mot. for Disc. at 1, 4. In November 2002, after receiving no response to his August letter, the plaintiff appealed the government's non-response. Fairchild's Statement ¶ 10. On February 2003, still without the information he sought, the plaintiff filed the instant complaint.[3]

In 1997, well before this case, Greg Herrick – an owner of the F-45 and a "close associate" of the plaintiff – submitted a FOIA request to the FAA for the same information that the plaintiff now seeks. *Id.* ¶¶ 2-4, 9. The FAA denied Herrick's request on the basis that the information was a trade secret and thus exempt from FOIA disclosure. *Id.* ¶ 6. Herrick brought suit in U.S. District Court for the District of Wyoming to challenge the FAA's invocation of the trade-secret exemption. *Id.* ¶ 8; *see also Herrick*, 200 F. Supp. 2d at 1322-23 (noting that Herrick "seeks to compel the agency to disclose certain technical drawings and other data provided to the agency by the Fairchild Aircraft Corporation in 1935 in connection with its 'Application for Approved Type Certificate' for an aircraft

---

[2] The FAA possesses this information because federal safety regulations required the FEAC to submit certain design specifications and technical drawings for the F-45 to the Civil Aeronautics Agency, the predecessor of the FAA. Fairchild's Statement ¶ 3.

[3] Fairchild Corporation moved to intervene as a defendant in this case and the court granted its motion on November 15, 2004. *Id.*

known as the Fairchild F-45").

In the lower court proceedings of *Herrick v. Harvey*, Herrick represented that he was "interested in the preservation of antique aircraft" and possessed a "1936 F-45 originally built by Fairchild Engine and Airplane Corporation." 200 F. Supp. 2d at 1322-23. The district court granted summary judgment to the FAA, upholding the FAA's application of the trade-secret exemption. *Id.* at 1329. Herrick appealed, arguing that (1) the documents no longer constituted a trade secret because the FAA had not shown that Fairchild owned the documents, (2) the documents lost secret status when Fairchild granted the FAA permission to release the documents to the public in 1955, and (3) Fairchild's new refusal to release the documents did not restore the exempt status of the documents because, again, Fairchild did not own the documents. 298 F.3d at 1190.

The Tenth Circuit affirmed the lower court, holding that Fairchild did in fact own the documents. *Id.* at 1191. Furthermore, the court held that the documents lost secret status when Fairchild granted the FAA permission to release the documents to the public in 1955. *Id.* Significantly, however, the court noted that Herrick "has not challenged the legal conclusion that it might be possible for [Fairchild] to revoke the permission to loan the documents to the public or that such a revocation would restore the secret nature of the documents." *Id.* at 1194 n.10. Thus, the court "decline[d] to overturn the district court's judgment on a point that the plaintiff has failed to challenge on appeal." *Id.*

III. ANALYSIS

A. Legal Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

B. The Court Grants Summary Judgment to the Defendants

1. The Doctrine of Res Judicata Bars the Plaintiff's Complaint

The FAA claims that the instant case is "a blatant attempt to circumvent the final judgment of the Tenth Circuit and parade the same arguments before a different federal judge." FAA's Mot. at 2; *see also* Fairchild's Mot. at 1. Specifically, the defendants argue that the court should dismiss the complaint on res judicata grounds because the plaintiff's claim is identical to the claim Greg Herrick raised in federal court in Wyoming and because Herrick is in privity with the plaintiff via the doctrine of virtual representation. FAA's Mot. at 12-13; Fairchild's Mot. at 1-2. The plaintiff responds that he is not in privity with Herrick because he did not participate in Herrick's litigation or in Herrick's FOIA request. Opp'n at 6. The plaintiff states that although he and Herrick are "members of the same antique aircraft association" and "have a common interest in the preservation of antique aircraft," the plaintiff and Herrick actually have different incentives and that the court therefore should not invoke res judicata. *Id.* at 7.

"The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983). Res judicata has two distinct aspects – claim preclusion and issue preclusion (commonly known as collateral estoppel) – that apply in different circumstances and with different consequences to the litigants. *NextWave Pers. Communications, Inc. v. Fed. Communications Comm'n*, 254 F.3d 130, 143 (D.C. Cir. 2001) (citing *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, at 946); *Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983). Under claim preclusion, "a final judgment on the merits of an action

precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Under issue preclusion or collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen*, 449 U.S. at 94). In short, "claim preclusion forecloses all that which might have been litigated previously," while issue preclusion "prevents the relitigation of any issue that was raised and decided in a prior action." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 949; *Novak*, 703 F.2d at 1309. In this way, res judicata helps "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and [] prevent serial forum-shopping and piecemeal litigation." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *see also Allen*, 449 U.S. at 94.

As a preliminary matter, the court notes that FAA proceeds under the rubric of claim preclusion/res judicata whereas Fairchild proceeds under the rubric of issue preclusion/collateral estoppel. FAA's Mot. at 10-20; Fairchild's Mot. at 1.[4] The court proceeds with the claim preclusion/res judicata framework because this case involves identical FOIA requests. *Wrenn v. Shalala*, 1995 WL 225234, *1 (D.C. Cir. Mar. 8, 1995); *ACLU v. DOJ*, 321 F. Supp. 2d 24, 34 (D.D.C. 2004) (discussing how res judicata can preclude

---

[4] The FAA argues in the alternative that the doctrine of issue preclusion would also bar this action. FAA's Mot. at 12 n.4. The court need not reach this issue because it holds that claim preclusion bars the action.

identical FOIA requests provided that a post-judgment event has not given rise to a new claim).

To succeed in demonstrating claim preclusion, the defendant must establish the "existence of (1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) an identity of the cause of action in both suits." *Paley v. Estate of Ogus*, 20 F. Supp. 2d 83, 87 (D.D.C. 1998) (citing authorities). The defendants argue that they meet each of the above four elements. FAA's Mot. at 10-20; Fairchild's Mot. at 7-9. In his opposition, however, the plaintiff only challenges the first and fourth elements. Opp'n at 3-7. The court limits its analysis accordingly.

a. The Plaintiff's and Herrick's Lawsuits are Identical

The FAA argues that "[t]he present claim is the same as the claim that was raised in the prior proceeding [because] the two submitted FOIA requests are the same, seek release of the same records, and the agency asserted exemption 4 in each instance." FAA's Mot. at 12; *see also* Fairchild Mot. at 1-2, 7. The plaintiff does not directly challenge these assertions. Instead, he argues that because the Tenth Circuit declined to address certain issues that Herrick "failed to argue on appeal," this court should proceed to the merits of this case to "answer an unanswered question [regarding the restoration of trade secret status]." Opp'n at 4-5.

The plaintiff's interest in having this court resolve an unanswered legal question does not overcome res judicata. Indeed, to put the plaintiff's argument in perspective, the Supreme Court has stated that courts should apply res judicata to a "judgment [that] may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated*

Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). If this court should apply res judicata in such circumstances, then surely it should apply the doctrine to *Herrick*, which the plaintiff only faults for not addressing an issue he deems important. Furthermore, as indicated above, the doctrine prevents the relitigation of "issues that were *or could have been dealt with in an earlier litigation*." *Angel v. Bullington*, 330 U.S. 183, 193 (1947) (emphasis added). The Tenth Circuit made it clear in this regard that Herrick simply failed to "challenge[] the legal conclusion that it might be possible for [Fairchild] to revoke the permission to loan the documents to the public or that such a revocation would restore the secret nature of the documents." 298 F.3d at 1194 n.10. Ultimately, therefore, in addition to being non-responsive to the defendants' arguments, the plaintiff's attempt to avoid res judicata on the grounds that this court should address an unanswered question is without merit.

b. The Plaintiff and Herrick are in Privity

As indicated above, to establish claim preclusion, the defendant must demonstrate "an identity of parties in both suits." *Paley*, 20 F. Supp. 2d at 87. Courts have used the term "privity" to encapsulate the relationship that must exist between the parties. *E.g.*, *Allen v. McCurry*, 449 U.S. 90, 94 (1980). As the D.C. Circuit has explained, "[the term 'privity'] designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963). The court can consider a variety of non-parties to a prior action to be privies of a party to the prior action: "(1) a nonparty who controls the original action; (2) a successor-in-interest to a prior party; and (3) a nonparty whose interests were adequately represented by a party to the original action." *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996). This case

concerns the third category, preclusion by adequate representation, or "virtual representation."

Virtual representation "should be applied on a case-by-case basis using a fact-specific inquiry." *American Forest Council v. Shea*, 172 F. Supp. 2d 24, 31 (D.D.C. 2001). The court should examine (1) identity of interests between the two parties; (2) a close relationship between the prior and present parties; (3) participation in the prior litigation; (4) apparent acquiescence; (5) whether the present party deliberately maneuvered to avoid the effects of the first action; (6) adequacy of representation viewed in terms of incentive to litigate; and (7) whether the case raises a public law issue or private law issue. *Id.* (summarizing *Tyus*, 93 F.3d at 454-56); *see also Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985) (stating that, "[i]n general, cases in which courts have based preclusion on virtual representation have involved special factors such as substantial elements of participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, or close relationships between the parties, such as that between family members") (internal quotations omitted).

The party asserting virtual representation need not establish all of the above elements. *See Tyus*, 93 F.3d at 454-55 (noting that "[d]ue to the equitable and fact-intensive nature of virtual representation, there is no clear test for determining the applicability of the doctrine"). At the very least, however, the doctrine requires closely aligned interests. *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975) (stating that "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative"); *cf. Holland v. Apfel*, 23 F. Supp. 2d 21, 26 (D.D.C. 1998) (declining to find virtual representation in light of a "disparity of incentives").

The defendants address each of the seven virtual representation factors. FAA Mot. at 1620; Fairchild Mot. at 10-13. The plaintiff's opposition, which acknowledges these seven factors, Opp'n at 6, only addresses participation in the prior litigation (the plaintiff denies any participation) and identity of interests (the plaintiff denies identical interests or incentives), *id.* at 7. Nevertheless, because the seven factors constitute a fluid test with imprecise boundaries, and because the case law suggests a broad, case-by-base inquiry, the court will not just focus on identity of interests and the plaintiff's lack of actual participation (a point which the defendants concede, FAA Mot. at 17; Fairchild Mot. at 12-13). *American Forest Council*, 172 F. Supp. 2d 31.

i. Identity of Interests, Close Relationship, Apparent Acquiescence, and Adequacy of Representation

The defendants argue that the plaintiff and Herrick seek the same relief and/or information and have similar motives because they are working together to restore an F-45 owned by Herrick. FAA Mot. at 16, Fairchild Mot. at 11. The plaintiff concedes that he and Herrick are members of the same antique aircraft association and have a common interest in the preservation of the same antique aircraft. Opp'n at 7. Nevertheless, the plaintiff attempts to distinguish his interests from those of Herrick by claiming that Herrick sought the information "to update his own private airplane" whereas the plaintiff "seeks the information for the public and in the interest of the preservation of antique aircraft heritage." Opp'n at 7.

A party opposing summary judgment must do so with affidavits or other admissible evidence, FED. R. CIV. P. 56(e), and the plaintiff has failed to do so. Moreover, the plaintiff's subtle distinction between his interests and those of Herrick has another, rather serious problem: the plaintiff previously represented to this court that Herrick "requested Mr. Brent

Taylor to assist him with the repair of his aircraft" and that Herrick sought the information in his litigation because Herrick was "in the process of repairing the aircraft as part of a museum collection to preserve a piece of aviation history." Pl's Mot. for Disc. at 4, 7. Thus, the court is left with two individuals who are quite fond of antique aircrafts and the historical preservation thereof, who are members of the same antique aircraft association, who keep apprised of each other's litigation,[5] and who successively used the same lawyer[6] to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and Taylor has agreed to repair. These facts, coupled with the plaintiff's total failure to present a scintilla of evidence in his favor, firmly establish an identity of interests, a close relationship between the parties, and Taylor's apparent acquiescence in Herrick's litigation. Furthermore, the parties essentially identical interests – not to mention their use of the same lawyer – establishes adequacy of representation, "which is best viewed in terms of incentive to litigate." *Tyus*, 93 F. 3d at 455 (noting that "one party 'adequately represents' the interests of another when the interests of the two parties are very closely aligned and the first party had a strong inventive to protect the interests of the second party").

---

[5] Apparently Herrick has also shared with Taylor certain information that Herrick obtained through discovery in his FOIA litigation. Pl.'s Mot. for Disc. at 2, 3 n.2.

[6] *See Tyus*, 93 F.3d at 457 (noting that the use of the same counsel suggests a close relationship between the parties). Herrick lost his appeal on July 24, 2002. 298 F.3d at 1184. Taylor, who acknowledges that he heard of the results of Herrick's case, made his initial FOIA request a month later, on August 22, 2002. Compl. Ex. A; Opp'n at 6.

ii. Public Versus Private Law and Deliberate Maneuvering

Application of the doctrine of virtual representation "is particularly appropriate for public law issues." *Tyus*, 93 F.3d at 456; *see also id.* at 457 (noting that a public law issue arises when the plaintiff alleges a right shared in common with the public). Furthermore,

> in public law cases, the number of plaintiffs with standing is potentially limitless. If parties wereallowed to continuallyraiseissues alreadydecided,publiclaw claims would assume immortality. Concerns of judicial economy and cost to defendants, while present in every suit, are particularly important in this context. There is another important consideration: in the public law context, if the plaintiff wins, by definition everyone benefits. Holdingpreclusion inapplicable in this context would encourage fence-sitting, because nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost.

Id. at 456 (internal citations and quotations omitted). The defendants argue that this case raises the same concerns other courts have expressed regarding fence-sitting in the public law context. FAA Mot. at 18-19; Fairchild Mot. at 12. Although the number of antique aircraft enthusiasts or individuals seeking information on the F-45 may not be limitless, the court does agree with the defendants' view that the plaintiff's prosecution of this case is unacceptable. *Tyus*, 93 F.3d at Had Herrick won his case, Taylor no doubt would have benefitted; after all, Taylor has already stated that Herrick shared his discovery materials with Taylor. On the other hand, now that Herrick has lost, Taylor is attempting to try again with the same request in this court. If Taylor loses here – and, indeed, he has – fellow antique aircraft enthusiasts cannot simply file their

own FOIA requests for the same information *ad infinitum* until they get the relief they want.

Similarly, Herrick's request for Taylor to assist him with the aircraft and the close alignment of Herrick and Taylor's interests as described above leads the court to conclude that the instant case is one of deliberate maneuvering to avoid the effects of the Herrick's abortive litigation. The plaintiff has presented nothing to this court to challenge the defendants' assertions that this case smacks of forum shopping and contravention of well-settled principles of res judicata. *Cf. Tyus*, 93 F.3d at 457 (noting the significant costs to the judicial system of tactical maneuvering). As indicated above, the plaintiff's main substantive challenge to the defendants' motions is to cite as a disputed material fact the unresolved *legal* issue that his own lawyer failed to raise on appeal in Herrick's case. That meritless argument has no bearing on res judicata; rather, it simply strengthens the court's belief that the plaintiff seeks to accomplish precisely what the doctrine forbids.

C. The Court Orders the Plaintiff to Show Cause Why the Court Should Not Award Attorneys's Fees to Both Defendants

As part of its motion for summary judgment, Fairchild moves the court to impose sanctions, "including but not limited to the award of reasonable attorney's fees[.]" Fairchild Mot. at 20. Under Federal Rule of Civil Procedure 11, a motion for sanctions must be filed separately from other motions or requests. FED. R. CIV. P. 11(c)(1)(A); *see also Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1323, 1328 (2d Cir. 1995) (denying a request for sanctions that the movant included in his motion to dismiss). Rather than requiring Fairchild to file a separate motion, however, the court notes that it has the inherent power to consider a Rule 11 sanctions motion *sua*

sponte by issuing an order directing the offending party to show case why it has not violated Rule 11(b). FED. R. CIV. P. 11(c)(1)(B); *see McLaughlin v. Brandlee*, 602 F. Supp. 1412 (D.D.C. 1985), *aff'd* 803 F.2d 1197 (D.C. Cir. 1986).

It should be clear to the plaintiff that the court deems his case ill-conceived. *See also McLaughlin*, 803 F.2d at 1205 ("when preclusion doctrine clearly forecloses consideration of the merits, the groundlessness of the litigation or the bad faith in which it was brought may become especially apparent"). Accordingly, the court will direct the plaintiff to show cause by June 1, 2005, why he and his lawyer should not split the costs incurred by Fairchild *and* the FAA.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motions for summary judgment. The court further directs the plaintiff to show cause by June 1, 2005, why he and his lawyer should not split the costs of defendant-intervenor Fairchild and defendant FAA. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 12th day of May, 2005.

RICARDO M. URBINA

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR,	:	
Plaintiff,	:	Civil Action No.:
	:	03-0173 (RMU)
v.	:	
	:	Document Nos.: 27, 29
MARION BLAKEY,	:	
Administrator, Federal	:	
Aviation Administration *et al*	:	
Defendants.	:	

ORDER

GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 12th day of May, 2005, it is hereby

ORDERED that the defendants' motions for summary judgment are **GRANTED**; and it is

FURTHER ORDERED that the plaintiff **SHOW CAUSE** by June 1, 2005 why he and his lawyer should not split the costs of defendant-intervenor Fairchild and defendant FAA; and it is

FURTHER ORDERED that defendant-intervenor Fairchild and defendant FAA shall submit a statement of costs on or before May 23, 2005.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

OPPOSITION BRIEF

(2)

No. 07-371

FILED

DEC 7 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, AND
THE FAIRCHILD CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

CATHERINE E. STETSON *
HOGAN & HARTSON LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

N. THOMAS CONNALLY
MICHAEL M. SMITH
HOGAN & HARTSON LLP
8300 Greensboro Drive
Suite 1100
McLean, VA 22102

* Counsel of Record

Counsel for Respondent
The Fairchild Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether the D.C. Circuit correctly concluded, based on the particular facts of this case, that petitioner Brent Taylor's Freedom of Information Act lawsuit seeking to compel disclosure of privately-owned aircraft plans was barred by res judicata, because Taylor was in privity with a prior FOIA complainant who lost his lawsuit to obtain the identical plans?

CORPORATE DISCLOSURE STATEMENT

Respondent The Fairchild Corporation has no parent corporation and no publicly held company owns ten percent or more of The Fairchild Corporation's common stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT	1
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO RELEVANT DIVISION AMONG THE FEDERAL COURTS OF APPEALS	6
A. Courts Faced with a Privity Question Examine the Facts of Each Case—Not Merely Whether a "Legal Relationship" Exists Between the Parties	6
B. Whether Notice Of and an Opportunity To Participate in the First Litigation Is Required for Res Judicata Depends on the Factual Circumstances of Each Case	9
II. THE DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT	10
III. THE D.C. CIRCUIT'S DECISION IS CORRECT	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES: Page

Chase Manhattan Bank, N.A. v. *Celotex Corp.*, 56 F.3d 343 (2nd Cir. 1995) 6

Eddy v. *Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007) 7

EEOC v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004) 7

Gonzalez v. *Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994) 9

Gustafson v. *Johns*, 213 Fed. App'x 872 (11th Cir. 2007) 7

Jaffree v. *Wallace*, 837 F.2d 1461 (11th Cir. 1988) 7

Perez v. *Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) 9,10

Richards v. *Jefferson County*, 517 U.S. 793 (1996) 3,11

Saylor v. *United States*, 315 F.3d 664 (6th Cir. 2003) 8

Tice v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998) 10

RULE:

Sup. Ct. R. 10 5

TREATISE:

18A Charles Alan Wright *et al.*, Federal Practice and Procedure § 4457 (2d ed. 2002) 8

IN THE

Supreme Court of the United States

No. 07-371

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, AND
THE FAIRCHILD CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

INTRODUCTION

Respondent The Fairchild Corporation respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

COUNTERSTATEMENT

In 1997, Greg Herrick filed a Freedom of Information Act request with the Federal Aviation Administration seeking disclosure of plans and specifications for the F-45, a 1930s vintage aircraft built by the corporate predecessor of respondent The Fairchild Corporation. Pet. App. 2a. Fairchild had

provided the plans and specifications to the FAA's predecessor agency in order to obtain the "type certificate" required to build, sell, or use the aircraft. J.A. 112.[1]

Today, there are only two F-45s in existence, and Herrick owns one of them. Pet. App. 24a. Herrick sought the plans and specifications from the FAA to restore that airplane. *Id.* at 10a. After consulting with Fairchild, the FAA denied Herrick's request on the ground that the information contained Fairchild trade secrets, and was therefore exempt from FOIA disclosure. *Id.* at 2A. Herrick sued the FAA in the U.S. District Court for Wyoming to compel disclosure. *Id.* The district court granted summary judgment for the FAA, concluding that the agency properly had withheld the documents, and the Tenth Circuit affirmed. *Id.*

About one month after the Tenth Circuit affirmed the Wyoming District Court's judgment against Herrick, Herrick's attorney submitted another FOIA request to the FAA—this time on petitioner Taylor's behalf—seeking the same plans and specifications for the F-45. *Id.* at 2a-3a. Taylor and Herrick are associates; Herrick previously had asked Taylor, an aircraft mechanic, to help restore Herrick's F-45. J.A. 49. The FAA denied Taylor's FOIA request, again on the ground that the information was exempt from disclosure. Pet. App. 3a. Taylor—still represented by Herrick's lawyer—sued the FAA in the U.S. District Court for the District of Columbia. *Id.* at 2a-3a. Fairchild intervened.

The FAA and Fairchild moved for summary judgment, arguing, among other things, that Taylor's suit was barred by res judicata (claim preclusion), as a result of Herrick's prior litigation. *Id.* at 3a The FAA and Fairchild explained that Herrick and Taylor were in privity for preclusion purposes because of the relationship they shared. *Id.* Fairchild pointed

---

[1] References to "J.A." are to the Joint Appendix submitted to the D.C. Circuit.

to the apparent "tactical maneuvering" of Herrick and Taylor to avoid the effect of the judgment in Herrick's case. *Id.* And Fairchild also filed a statement of undisputed material facts in which it described Herrick and Taylor as "close associates." *Id.* at 3a. Taylor did not challenge that characterization. *Id.*

The District Court entered summary judgment for the FAA and Fairchild on the ground that Taylor's action was barred by claim preclusion. *Id.* at 22-23a. In finding privity between Herrick and Taylor, the court concluded, based on the facts of this particular action, that the case presented "two individuals * * * who are members of the same antique aircraft association, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and Taylor has agreed to repair." *Id.* at 33a. Taylor appealed.

A unanimous D.C. Circuit panel affirmed, holding that Taylor was Herrick's privy and was therefore bound by the earlier judgment. *Id.* at 1a-2a. The court noted that "the term privity is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.* at 5a-6a, citing *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996). Thus, in some circumstances, a non-party to the original action whose interests were adequately represented in the first action may be barred from later raising the same claim, a form of privity known as "virtual representation." *Id.* at 6a.

The court also explained that under *Richards*, a finding of privity requires identical interests and adequate representation, as well as some relationship between the litigants in the successive actions. *Id.* at 7a. In other words, "there can be no virtual representation absent an affirmative link between the later litigant and either the prior party or the prior case." *Id.* at 8a-9a. In considering whether Herrick was Taylor's

privy, the court examined [a] the identity of interests between Herrick and Taylor, [b] whether Herrick adequately represented Taylor in the earlier litigation, and [c] whether there was an affirmative link between Herrick and Taylor by virtue of the undisputed "close associat[ion]" between the two. *Id.* at 3a, 8a-18a.

Evaluating the identity of interests between Herrick and Taylor in terms of their incentives to litigate, the court concluded that Herrick and Taylor had the same motive for seeking the plans and specifications: the restoration of Herrick's F-45. *Id.* at 9-11a. The court also observed that Herrick—the owner of the F-45—had at least as strong an incentive to litigate as Taylor, because the restoration of Herrick's airplane hinged on his obtaining the plans and specifications. *Id.* at 10a-11a. The interests of Herrick and Taylor were therefore identical.

Next, the court concluded that Taylor had been adequately represented by Herrick in the prior litigation. *Id.* at 11a-14a. The court again pointed to Herrick's strong incentive to litigate zealously in his own prior suit, finding it "eminently reasonable to believe an individual with a strong incentive to litigate a particular matter, by defending his own interest[,] adequately represents others with the same interest." *Id.* at 14a. Additionally, Taylor's use of Herrick's attorney, though not dispositive on the issue of adequate representation, strongly suggested Taylor's satisfaction with the manner in which Herrick's case was litigated. *Id.*

Last, the court reviewed the relationship between Herrick and Taylor: Herrick had requested Taylor's assistance with the restoration of Herrick's F-45; Herrick and Taylor were working together in Taylor's litigation; and Herrick and Taylor were close associates. *Id.* at 15a-16a. On these facts, the court agreed with the District Court that Herrick and Taylor were in a "close relationship" for the purpose of

determining whether Herrick was Taylor's virtual representative in the prior litigation. *Id.* at 16a.

The D.C. Circuit took pains to emphasize the fact-specific nature of its holding, noting that "[m]atters might look different if Taylor had submitted evidence before summary judgment explaining * * * why their common counsel's representation of Herrick did not adequately represent Taylor's interests, or demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft * * * or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents." *Id.* at 18a. In the absence of such evidence, however, the record supported a finding that Herrick and Taylor were in privity. *Id.* The court accordingly affirmed the District Court's judgment. Taylor did not seek rehearing of the panel's unanimous ruling, nor did he seek rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The petition does not meet any of the established criteria warranting certiorari. *See* Sup. Ct. R. 10. The D.C. Circuit panel did not "enter[] a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* R. 10(a). Taylor's protestations about a circuit split are substantially overblown; the result on the facts of this case would have been the same even in the circuits Taylor identifies as presenting purportedly "conflicting" opinions. *See id.* The D.C. Circuit also did not decide "an important federal question in a way that conflicts with relevant decisions of this Court." *See id.* R. 10(c). Nor, most assuredly, is this an issue of national importance. *See id.* The D.C. Circuit merely reviewed and approved the District Court's factbound determination that Taylor was in privity with Herrick. The petition should be denied.

I. THERE IS NO RELEVANT DIVISION AMONG THE FEDERAL COURTS OF APPEALS.

Taylor maintains that the D.C. Circuit's holding conflicts with various decisions of other courts of appeals, which Taylor asserts tend not to find litigants in privity for purposes of res judicata unless there is a "legal relationship" between them, or unless the litigant against whom preclusion is sought had notice of the prior case. Pet. App. 5-6. Taylor is mistaken. There is no mechanical formula by which courts determine the existence of privity. Rather, a determination that one party was adequately represented by another is made after a "functional inquiry" focusing on case-specific facts and circumstances. *Chase Manhattan Bank, N.A.* v. *Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995) ("[w]hether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions").

None of the other circuit court cases Taylor cites arose from facts like those in this case. And none of those cases accordingly supports Taylor's contention that the outcome in this case would have been different if it had been decided by another court of appeals.

A. Courts Faced with a Privity Question Examine the Facts of Each Case—Not Merely Whether a "Legal Relationship" Exists Between the Parties.

Taylor contends that several other circuits would have reached a different result than the unanimous panel reached in this case because there was no "legal relationship" between Taylor and Herrick. Pet. App. 9-10. That is not correct.

Contrary to Taylor's assertion, while the Eleventh Circuit considers the existence of a legal relationship an important

factor in its virtual representation analysis, *see EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287 (11th Cir. 2004), such a relationship is not a prerequisite to a finding of privity by virtual representation in all cases. *See, e.g., Gustafson* v. *Johns*, 213 Fed. App'x 872, 876 (11th Cir. 2007) (not reported) (expressly stating that a legal relationship or legal accountability is not an absolute requirement for privity under virtual representation theory); *Jaffree* v. *Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (discussing relevant factors in virtual representation analysis and finding privity in the absence of a legal relationship).

The Fourth and Sixth Circuits, for their part, have been hesitant to embrace the term "virtual representation" in cases where there is no clear relationship between the litigants in successive suits, but they have applied the same principles to preclude claims where the litigants in consecutive cases were, like Herrick and Taylor, much more than "mere strangers" to each other.

For example, in *Eddy* v. *Waffle House, Inc.*, 482 F.3d 674, 680 (4th Cir. 2007), *petition for cert. filed* 76 U.S.L.W. 3212 (U.S. Oct. 11, 2007) (No. 07-495), the Fourth Circuit held that the family members of a party against whom a jury verdict had been entered in a discrimination case were collaterally estopped from pursuing their own claims because the two groups of litigants sought to vindicate the same rights, the cases arose from the same incident, and the litigants were represented by the same attorney. Though not directly discussed by the court as a factor in its privity analysis, the parties also shared a close personal relationship. *Id.* at 676. While the majority did not invoke "virtual representation" by that name in its discussion of estoppel principles, it is the only plausible basis for the preclusion ruling. *See id.* at 684-685 (Michael, J., dissenting) (identifying virtual representation as the basis of the court's holding).

Similarly, in *Saylor* v. *United States.*, 315 F.3d 664, 668 (6th Cir. 2003), the Sixth Circuit observed that "[n]ormally, a judgment is not claim preclusive as to non-parties." But that presumption can be overborne, the court of appeals explained, where (among other things) the subsequent party's interests were "adequately represented" in the first case. *Id.* at 668-669. The *Saylor* court concluded that non-parties were bound by the judgment in an earlier case brought by similarly situated plaintiffs because they had been adequately represented in that first suit: they brought "precisely the same claim," with "not one fact" distinguishing the first suit from the second, and their "interests [we]re identical." *Id.* at 668-669. There was no legal relationship between the two groups of related plaintiffs, nor were they legally accountable to each other. *See id.; see also* 18A Charles Alan Wright *et al.*, Federal Practice and Procedure § 4457 at n.24 (2d ed. 2002) (discussing case in the context of virtual representation). And, just as in this case, had the plaintiffs in the first suit succeeded, plaintiffs in the second suit would have benefited from the result—negating the need for them to bring their own subsequent claim.

Moreover, none of the cases on which Taylor relies is factually similar to this one: none involved two individuals who shared the same narrow objective in litigation, who know each other, who worked together, who used the same attorney in pursuing their claims, and who would have shared the same benefit if either of their suits had been successful. In light of these important distinctions, and because a finding of privity is always a factbound inquiry, none of the cases cited by Taylor supports his assertion that the outcome in this case would have been different had it been decided by some other circuit court of Taylor's choosing.

B. Whether Notice Of and an Opportunity To Participate in the First Litigation Is Required for Res Judicata Depends on the Factual Circumstances of Each Case.

Taylor next points to cases from the First and Seventh Circuits that he contends require prior notice (at the time of the first litigation) to the party against whom claim preclusion is asserted. Those cases, which involved parties who were mere strangers to each other, are inapposite.

In *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994), the court specifically noted that the parties in the first and second actions did not share any "special type of close relationship" with each other. *Id.* at 762 (noting that the litigants were "unrelated lambs purportedly fleeced by the same cadre of unscrupulous sheepherders"). In discussing whether notice was required before a non-party would be bound by prior litigation, the court held that constructive notice was enough to satisfy due process concerns, and that such notice could be implied, among other circumstances, from a close relationship between litigants, or from "tactical manuevering" by litigants. *Id.* at 761.[2]

Indeed, because of the "discretionary character" of the virtual representation doctrine, the court expressly eschewed any rigid standard for its application, and made clear that it would "not conclude that a case falls outside the theory's purview solely because it does not fit snugly into some preconceived niche or mirror some established fact pattern." *Id.* at 762-763.

Perez v. *Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) also offers no insight into how the First Circuit would rule on

---

[2] Taylor therefore is wrong to suggest that only a "legal relationship" could provide constructive notice under the court's holding in *Gonzalez*.

the facts of this particular case. In *Perez*, the court held that purchasers of one model of automobile were not bound by the judgment in a previous class action in which the certified class included only purchasers of a different model of automobile, even though both models were built by the same manufacturer. *Id.* at 311-312. Those facts are quite a far cry from those here. The *Perez* court simply held that virtual representation cannot be used as a short cut to evade the due process protections applicable in the context of class action litigation, a concern not implicated by this case. *See* Pet. App. 17a-18a (noting that this case's unusual circumstances would limit its prospective effect on other litigants).

Similarly, in *Tice* v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998) the Seventh Circuit rejected the use of virtual representation as a substitute for procedural safeguards in the class action context where litigants in successive suits were strangers to each other. *Id.* at 974 (noting the absence of any relationship between the litigants). In fact, the two groups of successive plaintiffs in *Tice* had interests adverse to each other. *See id.* at 973 (noting that "[w]hat helps [one group of plaintiffs] may directly hurt the other").

Gonzalez, *Perez*, and *Tice*, in short, are so factually dissimilar from this case that the analysis in each sheds no light on how those courts would have ruled in the instant litigation.

II. THE DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Taylor also contends that the D.C. Circuit's decision conflicts with this Court's holding in *Richards* because the D.C. Circuit held that notice of the prior litigation is not an absolute requirement in all cases where claim preclusion is asserted.

As Chief Judge Ginsburg notes in his opinion, however, this Court pointedly left open this question in *Richards*. Pet. App. 12a, citing *Richards*, 517 U.S. at 801. In any event, it is not clear on this record whether Taylor did, in fact, have notice of Herrick's earlier litigation while that litigation was pending, *see* Pet. App. 13a-14a, making this case an inappropriate vehicle for resolving that open issue.

Taylor also erroneously argues that under *Richards*, a party cannot be bound by the judgment in an earlier case unless the court in the earlier case took special precautions to ensure that the interests of the absent party were adequately represented. Pet. App. 12-13. As Taylor himself notes, however, this is true only in the absence of "a sufficient relationship between the parties to the first and second litigation." *Id.* at 12. The *Richards* Court noted that the plaintiffs in the second suit were "mere strangers" to the plaintiffs in the first, and thus could not be bound by the judgment in that case unless the first court took precautions to protect their interests. Here, by contrast, the D.C. Circuit specifically found that Herrick and Taylor were close associates who collaborated with each other in bringing successive lawsuits, and that Herrick adequately represented Taylor in the earlier litigation. *Id.* at 14a-16a.

III. THE D.C. CIRCUIT'S DECISION IS CORRECT.

The D.C. Circuit thoroughly examined and upheld the District Court's determination of privity, and its decision represents a careful and logical application of this Court's precedent to the unusual facts of this case. The case was correctly decided.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CATHERINE E. STETSON *
HOGAN & HARTSON LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

N. THOMAS CONNALLY
MICHAEL M. SMITH
HOGAN & HARTSON LLP
8300 Greensboro Drive
Suite 1100
McLean, VA 22102

* Counsel of Record

Counsel for Respondent
The Fairchild Corporation

OPPOSITION BRIEF

77

(3)

No. 07-371

12-10-07

In the Supreme Court of the United States

BRENT TAYLOR, PETITIONER

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in this case under the Freedom of Information Act, the facts establish that petitioner was "virtually represented" in a prior case, in which his fellow antique airplane club member and "close associate," through the same attorney, unsuccessfully sought disclosure of the same antique airplane plans, such that petitioner's case was validly dismissed under principles of res judicata.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Becherer v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999) 13
EEOC v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004), cert. denied, 546 U.S. 811 (2005) 14, 15
Gustafson v. *Johns*, 213 Fed. Appx. 872 (11th Cir. 2007) 15
Headwaters, Inc. v. *United States Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) 10
Herrick v. *Garvey*, 298 F.3d 1184 (10th Cir. 2002) 2
Irwin v. *Mascott*, 370 F.3d 924 (9th Cir. 2004) 6
Martin v. *American Bancorp. Ret. Plan*, 407 F.3d 643 (4th Cir. 2005) 13
Martin v. *Wilks*, 490 U.S. 755 (1989), cert. denied, 492 U.S. 932 (1989) 6, 7, 9
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 9
NAACP v. *Hunt*, 891 F.2d 1555 (11th Cir. 1990) 14
Nat'l Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 11

Case–Continued: Page

Niere v. *St. Louis County*, 305 F.3d 834 (8th Cir. 2002) 15
Perez v. *Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) .. 13
Pollard v. *Cockrell*, 578 F.2d 1002 (5th Cir. 1978) 13
Richards v. *Jefferson County*, 517 U.S. 793 (1996), cert. denied, 534 U.S. 1019 (2001) ..... *passim*
South Cent. Bell Tel. Co. v. *Alabama*, 526 U.S. 160 (1999) 5, 9
Tice v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999) 14
Tyus v. *Schoemehl*, 93 F.3d 449 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997) 3, 4, 15
United States v. *Johnston*, 268 U.S. 220 (1925) 9
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 11

Statute:

Freedom of Information Act, 5 U.S.C. 552 (2000 & Supp. V 2005):
5 U.S.C. 552(b)(4) 2

Miscellaneous:

18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 2002) 12

In the Supreme Court of the United States

No. 07-371

BRENT TAYLOR, PETITIONER

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 490 F.3d 965. The opinion of the district court (Pet. App. 22A-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. The petition for a writ of certiorari was filed on September 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a mechanic who restores vintage aircraft, is the executive director of the Antique Aircraft Association. Pursuant to a claim under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2000 & Supp. V

2005), he seeks from respondent Federal Aviation Administration (FAA) the plans of an antique F-45 aircraft manufactured by a predecessor of respondent Fairchild Corporation (Fairchild).

Previously, another member of the Antique Aircraft Association, Greg Herrick, failed to secure those same plans in a FOIA case in the Tenth Circuit. See *Herrick* v. *Garvey*, 298 F.3d 1184 (2002). Herrick was the owner of an F-45 aircraft and a "close associate" of petitioner. Pet. App. 2a-3a. To that end, Herrick filed a FOIA request with the FAA seeking the plans and specifications of the F-45. *Id.* at 2a. The FAA, after consulting Fairchild, determined that the documents contained trade secrets and thus, under Exemption 4 of the FOIA, were not subject to disclosure. *Ibid.*; see 5 U.S.C. 552(b)(4). Herrick filed suit. After the United States District Court for the District of Wyoming granted summary judgment in favor of the FAA, the Tenth Circuit affirmed. *Ibid.* The Tenth Circuit determined that a letter by Fairchild's predecessor authorizing disclosure deprived the documents of trade secret status. *Ibid.* But that court went on to hold that, because Herrick had not challenged on appeal the district court's assumption that Fairchild's subsequent letter revoking that authorization was effective, the court of appeals too would assume that letter's effectiveness. *Ibid.*

2. About a month after the *Herrick* decision, petitioner, who had planned to help Herrick restore his aircraft, filed a FOIA request for the same documents that Herrick had unsuccessfully sought. Pet. App. 2a. After not receiving a response from the FAA, petitioner, represented by the same attorney who had represented Herrick, continued to seek release of the plans. *Ibid.* Ultimately, the FAA again withheld the material under

Exemption 4. *Id.* at 3a. Petitioner, who was still represented by Herrick's attorney and was given access to Herrick's discovery materials from the previous lawsuit, *id.* at 34a, filed suit in district court. *Id.* at 3a. Fairchild intervened as a defendant. *Ibid.*

The district court granted summary judgment in favor of the FAA and Fairchild. The court held that res judicata barred petitioner's claim because Herrick had already litigated to a final judgment that same claim in another court. Specifically, the court held that there was "(1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) an identity of the cause of action in both suits." Pet. App. 29a. With respect to the identity of parties prong, the court found that Herrick and petitioner were in privity because "Herrick was [petitioner]'s 'virtual representative' in *Herrick* v. *Harvey*." *Id.* at 22a.

In reaching that conclusion, the court applied a multi-factor test enunciated by the Eighth Circuit in *Tyus* v. *Schoemehl*, 93 F.3d 449, 454 (1996), cert. denied, 520 U.S. 1166 (1997). Pet. App. 30a-35a (considering identity of the interest between the two parties, the close relationship of prior and present parties, participation in prior litigation, apparent acquiescence, deliberate maneuvering to avoid the effects of the first action, adequacy of representation in terms of incentive to litigate, and the private or public nature of the case) (citing *Tyus*, 93 F.3d at 454). Considering those factors, the court stated that the evidence showed Herrick and petitioner were

> two individuals who are quite fond of antique aircrafts and the historic preservation thereof, who are members of the same antique preservation associa-

> tion, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and [petitioner] has agreed to repair.

Id. at 33a. The court concluded that those "facts, coupled with [petitioner's] total failure to present a scintilla of evidence in his favor, firmly establish an identity of interests, a close relationship between the parties, and [petitioner's] apparent acquiescence in Herrick's litigation" sufficient to preclude relitigation. *Ibid.*

Finally, the court noted that "[a]pplication of the doctrine of virtual representation is particularly appropriate for public law issues" such as this one because "in public law cases, the number of plaintiffs with standing is potentially limitless." Pet. App. 34a (quoting *Tyus*, 93 F.3d at 456). While recognizing that "the number of antique aircraft enthusiasts or individuals seeking information on the F-45 may not be limitless," the court noted that

> [h]ad Herrick won his case, [petitioner] no doubt would have benefitted; after all, [petitioner] has already stated that Herrick shared his discovery materials with [petitioner]. * * * [N]ow that Herrick has lost, [petitioner] is attempting to try again with the same request in this court. If [petitioner] loses here * * * [,] fellow antique aircraft enthusiasts cannot simply file their own FOIA requests for the same information *ad infinitum* until they get the relief they want.

Id. at 34a-35a. The court concluded, in light of "Herrick's request for [petitioner] to assist him with the aircraft and the close alignment of Herrick's and [peti-

tioner's] interests," that "the instant case is one of deliberate maneuvering." *Id.* at 35a.

3. The court of appeals unanimously affirmed, holding that res judicata barred petitioner's lawsuit. Pet. App. 3a, 21a. The court agreed with the district court's determination that Herrick had virtually represented petitioner in the previous lawsuit. *Id.* at 5a-18a. It explained that this Court in *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996), and *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160, 167-168 (1999), has "suggest[ed] both that identical interests and adequate representation are necessary conditions for virtual representation, and that there must be some relationship between the litigant and his putative proxy." Pet. App. 7a. The court did not, however, "read *Richards* to hold a nonparty was adequately represented only if special procedures were followed or the party to the prior suit understood it was representing the nonparty." *Ibid.* The court explained that, although "those circumstances tend to support a finding of adequate representation, * * * there is no reason to believe they are the only circumstances in which res judicata is consistent with due process." *Ibid.*

The court of appeals adopted a multi-factor test to determine when a finding of virtual representation is appropriate. Pet. App. 7a. Specifically, the court held that a finding of virtual representation requires a showing of both identity of interests and adequate representation, in addition to a showing of at least one of the following factors: "a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.* at 8a (cit-

ing *Irwin* v. *Mascott*, 370 F.3d 924, 930 (9th Cir. 2004)). The court in this case made clear that "there can be no virtual representation absent an affirmative link between the later litigant and either the prior party or the prior case." *Id.* at 8a-9a.

Applying those factors, the court of appeals held that a finding of virtual representation was warranted in this case. First, the court found "identity of interests" because petitioner "seeks the same result as did Herrick," and "had substantially the same incentive to achieve it." Pet. App. 9a. Indeed, petitioner "concede[d] he share[d] Herrick's interest in the preservation of antique aircraft as a general matter," and "admitted * * * that Herrick had asked him to assist with the restoration of Herrick's F-45." *Id.* at 10a.

The court next held that petitioner had been adequately represented in Herrick's lawsuit. Pet. App. 11a. The court noted that, while "[n]otice is ordinarily a key element of due process," a subsequent litigant's notice of the prior litigation while it was ongoing "is neither a sufficient nor a necessary condition of adequate representation." *Id.* at 12a (citing *Richards*, 517 U.S. at 799-800). Acknowledging that other courts have held that notice is required for a finding of virtual representation in some cases, the court explained that "[t]o deem notice sufficient would in effect transform permissive into mandatory intervention in judicial proceedings, a step the Supreme Court rejected in *Wilks*." *Ibid.* (citing *Martin* v. *Wilks*, 490 U.S. 755, 762-763 (1989)). The court likewise declined to deem notice necessary to virtual representation in all cases because, if notice were a condition precedent, "a close associate of the prior party, with identical interests, could relitigate a claim that was zealously but unsuccessfully tried to judgment

and that, even if he had received notice of and intervened in the prior case, would have proceeded in the same way." *Ibid.* (stating that this Court "pointedly left open" that question in *Richards*, 517 U.S. at 801). Noting that the record was insufficient to show that petitioner had notice of Herrick's lawsuit while it was ongoing, the court "turn[ed] to other indicia * * * to determine whether [petitioner] was adequately represented by Herrick." *Id.* at 13a-14a. Specifically, the court relied on two factors: first, "Herrick had an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than [petitioner's], and [s]econd, Herrick and [petitioner] used the same attorney to pursue their FOIA claims." *Id.* at 14a.

The court then held that petitioner and Herrick share a "close relationship" such that a finding of virtual representation was warranted. Pet. App. 15a-16a. The court rejected the notion "that only a legal relationship may qualify as a 'close relationship.'" *Id.* at 15a (citation omitted). Rather, the court held that "[w]hether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question." *Ibid.* In this case, the court pointed to facts demonstrating that

> Herrick and [petitioner] were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well: Herrick asked [petitioner] to assist him in restoring his F-45, provided information to [petitioner] that Herrick had obtained through discovery, and at summary judgment [petitioner] did not oppose Fairchild's characterization of Herrick as his "close associate."

Ibid.[1]

The court thus concluded that Herrick had been petitioner's virtual representative in the previous lawsuit. It emphasized the fact-bound, limited nature of that holding, however, specifically noting that the links between petitioner and Herrick were so strong that they "simply do not implicate * * * concerns" (Pet. App. 18a) as to the use of FOIA generally by "reporters, public interest organizations, and academics, who are likely to associate with others having similar interests." Pet. App. 17a.

After further holding that *Herrick* was a final judgment on the merits, Pet. App. 18a-19a, and that there was an identity of claims, *id.* at 19a-20a, the court held that res judicata barred petitioner's lawsuit.

ARGUMENT

Petitioner argues (Pet. 12-14) that the court of appeals departed from this Court's precedent when it held that the doctrine of virtual representation applied in this case. He also argues (Pet. 5-12) that certiorari is warranted because the circuits are split over the proper way

---

[1] Additionally, the court noted that there was some evidence of "tactical maneuvering" in this case. Pet. App. 16a. Specifically, the court observed that petitioner filed his case "on the heels of a court decision affirming the government's position with the assistance of the losing party to the prior litigation," which "suggests Herrick and [petitioner] coordinated the filing of [petitioner's] request—and the litigation that would almost certainly follow—so that [petitioner] could try where Herrick had failed, to the benefit of both." *Id.* at 16a-17a. The court agreed with petitioner, however, that "these facts do not necessarily show collusion to avoid the preclusive effects of *Herrick*." *Id.* at 17a. Given "the ambiguity of the facts," the court did not treat the evidence suggesting collusion as dispositive of the virtual representation issue in this case. *Ibid.*

to apply the virtual representation doctrine. Petitioner's contentions lack merit and do not warrant this Court's review.

1. Petitioner asserts (Pet. 12-14) that the court of appeals' holding that Herrick was petitioner's virtual representative in the previous litigation is "wrong on the merits." Pet. 12. That fact-bound argument does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). At any rate, there is no merit to petitioner's contention. And, contrary to petitioner's contentions, the court of appeals' decision is fully consistent with this Court's holdings in *Richards* v. *Jefferson County*, 517 U.S. 793 (1996), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

In *Richards*, a case involving successive suits by different taxpayers challenging the constitutionality of a state tax statute, this Court acknowledged that a person need not necessarily be a party to a judgment to be bound by it "when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." 517 U.S. at 798 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)). The Court ultimately held that the taxpayers' suit was not barred by a previous taxpayer lawsuit challenging the same tax. *Id.* at 802. Explaining that, because the two sets of litigants were "best described as mere 'strangers' to one another," the Court could not conclude that the prior litigants "provided representation sufficient to make up for the fact that petitioners neither participated in, * * * nor had the opportunity to participate in," the prior lawsuit. *Ibid.*; see also *South Central Bell*, 526 U.S. at 167-

168 (declining to hold that the petitioner's lawsuit was barred by res judicata where, as in *Richards*, petitioner and the prior litigants were "strangers," and "no one claim[ed] that there [was] 'privity' or some other special relationship between the two sets of plaintiffs"). In so holding, moreover, the Court in *Richards* expressly distinguished between private-law claims, such as the "challenge to a State's attempt to levy personal funds" involved in that case, and public-law claims, such as challenges to "public action that ha[ve] only an indirect impact on [the litigants'] interests." *Id.* at 803. As to the latter category, this Court "assume[d] that the States have wide latitude to establish procedures * * * to limit the number of judicial proceedings that may be entertained."[2] *Ibid.*

a. Correctly recognizing that *Richards* did not hold that "a nonparty was adequately represented only if special procedures were followed or the party to the prior suit understood it was representing the nonparty," Pet. App. 20a-21a, the court of appeals held that Herrick had "adequately represented" petitioner in his previous lawsuit. That determination was based on petitioner's "close relationship" with Herrick, *id.* at 15a, and was consistent with this Court's decision in *Richards*, 517 U.S. at 798. Unlike the litigants in *Richards* and

---

[2] In *Headwaters, Inc.* v. *United States Forest Service*, 399 F.3d 1047 (9th Cir. 2005), a challenge by environmental organizations to timber sales, the court "reject[ed] the invitation to craft a 'public right' exception to the due process requirement of adequate representation." *Id.* at 1054. But it did so by misconstruing *Richards*. The court went on to state that "*Richards* itself involved a question that pertained to all taxpayers, and the public nature of that question did not lead the Supreme Court to create an exception to its adequate representation holding." *Ibid.* Thus, *Headwaters* ignored the distinction that this Court expressly drew between the two categories of taxpayer lawsuits.

South Central Bell, petitioner and Herrick were not "mere 'strangers'." *Richards*, 517 U.S. at 802. Rather, the district court and court of appeals both found that petitioner and Herrick had a close relationship, were working together to restore a vintage aircraft for which they each sought plans under FOIA, and had shared discovery materials. As petitioner points out (Pet. 13; Pet. App. 13a), the court of appeals noted that the record did not reflect that petitioner had actual notice of Herrick's lawsuit as it was ongoing. Nonetheless, petitioner errs in contending that a finding of privity in this case runs counter to this Court's emphasis on notice in *Mullane*. Pet. 13-14. In *Richards*, this Court expressly "le[ft] open the possibility" that in some cases, "adequate representation might cure a lack of notice," and, as the court of appeals held, this is just such a case. 517 U.S. at 801.

b. Moreover, this case involves a public-law issue, whereas *Richards* and *Mullane* involved the vindication of private interests. Here, although petitioner and Herrick each was personally interested in the public disclosure of the plans to the F-45, their respective FOIA actions necessarily were predicated on the *public's* general interest in receiving information. As this Court has emphasized, "[a] person requesting the information needs no preconceived idea of the uses the data might serve. The information *belongs to citizens* to do with as they choose. * * * [T]he disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (FOIA "focuses on the

citizens' right to be informed about 'what their government is up to'") (citation omitted).

This Court recognized in *Richards* that, in a public-law context, courts have greater latitude to preclude relitigation of claims. See *Richards*, 517 U.S. at 803 (noting that "wide latitude" to establish preclusion procedures in public-law cases is appropriate). Concerns with respect to judicial economy and the high cost of relitigating potentially unlimited claims—concerns that are implicated most often in public-law cases, in which there are many potential plaintiffs seeking the same benefit for the public generally—make preclusion in the instant case particularly appropriate. See 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4457, at 548 (2d ed. 2002) ("Virtual representation is more readily found in public law cases," because "[r]esolution of public issues has only an indirect impact on individual interests, and there is a potentially limitless supply of plaintiffs."). Because any number of individuals have standing to sue under FOIA, a holding that preclusion does not apply in this case would allow numerous associated plaintiffs to file successive FOIA requests seeking a second bite at the apple, even though the Tenth Circuit has already held that the requested plans are protected by trade secret status.[3] Therefore, the court of appeals' finding of privity was particularly appropriate in the instant case, especially in light of the

---

[3] Of course, as the court of appeals made clear, the requirement that the plaintiffs have, *inter alia*, a "close relationship" provides a limiting principle to the virtual representation doctrine, even in public-law cases. Thus, the court of appeals' decision would not interfere with the use of FOIA as a general matter by "reporters, public interest organizations, and academics, who are likely to associate with others having similar interests." Pet. App. 17a.

strong record evidence of a close relationship between petitioner and Herrick. The court of appeals' narrow, fact-bound decision in this public-law case is thus fully consistent with *Richards*; that this Court has not found privity in the context of a different, private-law case is of no consequence.

2. Petitioner argues (Pet. 5-12) that certiorari is warranted because the courts of appeals are divided on the proper way to apply the doctrine of virtual representation. He argues that a number of circuits require proof of notice, a legal relationship, or both before a finding of virtual representation is appropriate. This case, however, is not an appropriate vehicle for addressing any variations in the court of appeals' approaches.

Specifically, the cases that petitioner claims conflict with the court of appeals' decision are distinguishable because they involve private-law claims, while, as discussed above, the instant case involves public-law claims. See *Perez* v. *Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir. 2001) (suit brought by car owners alleging fraud and a scheme to inflate car prices artificially not precluded by prior suit brought by car owners in a different state); *Martin* v. *American Bancorp. Retirement Plan*, 407 F.3d 643, 651-652 (4th Cir. 2005) (ERISA suit brought by retirement plan beneficiaries alleging they were owed additional benefits not precluded by prior suit brought by different group of beneficiaries); *Pollard* v. *Cockrell*, 578 F.2d 1002, 1008-1009 (5th Cir. 1978) (constitutional challenge to law regulating massage parlors brought by patrons seeking to preserve their own rights to attend those establishments not precluded by prior suit brought by massage parlor owners); *Becherer* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 424 (6th Cir. 1999) (en banc) (inves-

tors' breach-of-contract suit against real estate developer not precluded by prior breach-of-contract action brought by different group of investors); *Tice* v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999) (pilots' age-discrimination claim challenging airline's retirement policy not precluded by prior age-discrimination suit brought by different group of litigants challenging airline's hiring policy); *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004) (Title VII enforcement action charging employer with racial discrimination not precluded by prior private discrimination suit).

Unlike in those cases, a finding of privity on a virtual representation theory in the instant case—without requiring a further showing of notice or a legal relationship, as discussed above—is appropriate and consistent with this Court's precedent. See *Richards*, 517 U.S. at 803. Indeed, a number of courts have recognized the distinction between public and private interests in cases involving virtual representation. For instance, in *NAACP* v. *Hunt*, 891 F.2d 1555 (1990), the Eleventh Circuit held that a finding of res judicata on a virtual representation theory was appropriate in a public interest case involving a state legislator's constitutional challenge to flying the confederate flag above the Alabama state capitol dome. The court held that the NAACP had virtually represented the state legislator in a prior suit on the same issue, even though they did not have a legal relationship. The court explained that the interest of the state legislator "was so closely aligned to the NAACP's interests in the original suit that he was their virtual representative." *Id.* at 1561.

Subsequently, in *Pemco Aeroplex, Inc.*, a private-law case, the Eleventh Circuit expressly distinguished *Hunt*

on the ground that it "involved a general public law issue that affected the plaintiffs' private interests only indirectly, unlike the alleged racial harassment" in *Pemco Aeroplex*. 383 F.3d at 1289. Moreover, the court pointed out that in *Richards*, this Court "explicitly distinguished between such generalized public law challenges and more individualized cases." *Ibid.*;[4] see also *Gustafson* v. *Johns*, 213 Fed. Appx. 872, 876 (11th Cir. 2007) (holding that district court's determination that, in a public-law case, a plaintiff in a subsequent lawsuit need not have a legal relationship with a plaintiff in a prior lawsuit for virtual representation to apply "is consistent with United States Supreme Court and this Circuit's case law"); see also *Niere* v. *St. Louis County*, 305 F.3d 834, 837-838 (8th Cir. 2002) ("Virtual representation applies where litigation is public in nature and the plaintiffs barred by res judicata had common interests with the actual litigants."); *Tyus*, 93 F.3d at 454-456 (noting that the doctrine of virtual representation is more appropriately applied in a public-law case). Accordingly, the court of appeals' decision in the instant public-law case does not conflict with the cases that petitioner cites, all of which involve the vindication of private interests.

---

[4] Thus, for the same reasons, there is no merit to petitioner's contention (Pet. 9-10) that the court of appeals' decision in the instant case conflicts with *Pemco Aeroplex*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

DECEMBER 2007

REPLY BRIEF

77

FILED
DEC 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-371

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, AND FAIRCHILD CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

MICHAEL JOHN PANGIA
THE LAW OFFICES OF
MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

December 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 193 F.3d 415 (6th Cir. 1999) 2

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006) 7

Eddy v. Waffle House, Inc., 482 F.3d 674 (4th Cir. 2007) 3

FEC v. Akins, 524 U.S. 11 (1998) 7

Gonzalez v. Banco Central Corp., 27 F.3d 751 (1st Cir. 1994) 3, 4

Hardy v. Johns-Manville Sales Co., 681 F.2d 334 (5th Cir. 1982) 2

Headwaters v. United States Forest Service, 399 F.3d 1047 (9th Cir. 2005) 6

Martin v. American Bancorp. Retirement Plan, 407 F.3d 643 (4th Cir. 2005) 2

Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir. 1990) 2

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 8

NAACP v. Fordice,
105 F.3d 655, 1996 WL 767432
(5th Cir. Dec. 23, 1996) 5

Perez v. Volvo Car Corp.,
247 F.3d 303 (1st Cir. 2001) 4

Pollard v. Cockrell,
578 F.2d 1002 (5th Cir. 1978) 2

Richards v. Jefferson County,
517 U.S. 793 (1996) 6, 7, 8

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999) 7

Tice v. American Airlines, Inc.,
162 F.3d 966 (7th Cir. 1998) 4

STATUTE

5 U.S.C. § 552(a)(4)(B) 7

PETITIONER'S REPLY BRIEF

The question presented here is whether petitioner Brent Taylor may be precluded from litigating his case on the ground that the judgment in an earlier case—litigation of which Taylor had no notice, brought by a plaintiff with whom Taylor had no legal relationship—provided Taylor all the process he was due. In holding Taylor precluded, the D.C. Circuit acknowledged that it was disagreeing with the Fourth, Fifth, and Sixth Circuits as to whether a legal relationship between the party to the first case and the party to the second case is necessary for virtual representation—*see* Pet App. 15a ("Unlike the courts just cited, we do not believe that only a legal relationship may qualify as a 'close relationship.'")—and with the First and Seventh Circuits as to whether notice is necessary for virtual representation—*see* Pet. App. 12a-13a ("[U]nlike the First and Seventh Circuits, which have treated notice as necessary for a finding of virtual representation . . . we see no reason to treat notice as anything more or less than an important consideration."). Neither respondent succeeds in its attempts to downplay these circuit splits or to reconcile the decision below with this Court's precedents.

1. The Fairchild Corporation claims that there is no "relevant" circuit split because courts "examine the facts" in determining whether there is privity, and none of the cases cited in the petition have exactly the same facts as this case. Fairchild Opp. 6. Contrary to Fairchild's depiction of circuit-court case law on virtual representation, however, courts do not just set forth the facts of the case and then perform a gut-check to decide whether the parties are in privity: They follow legal rules. And the legal rule set forth by the D.C. Circuit in the decision below conflicts with the legal rules set forth

in decisions of the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits.

Fairchild does not even attempt to dispute that, in contrast to the decision below, the Fifth Circuit requires "an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." *Meza v Gen. Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990); *see also, e.g., Hardy v. Johns-Manville Sales Co.*, 681 F.2d 334, 340 (5th Cir. 1982); *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978). Indeed, although the petition cited multiple Fifth Circuit cases that conflict with the decision below, Pet. 6-7, Fairchild's brief in opposition fails to mention that circuit at all.

Fairchild does argue that the outcome of this case would have been the same in the Fourth and Sixth Circuits, Fairchild Opp. 7-8, but its assertion that those circuits do not require a legal relationship between the parties to the first and second litigation is wrong. In *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Co.*, 193 F.3d 415, 424 (6th Cir. 1999), the Sixth Circuit, sitting en banc, held that virtual representation requires "'an express or implied *legal* relationship in which parties to the first suit are *accountable* to non-parties who file a subsequent suit raising identical issues.'" (emphasis in original) (quoting *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987)). Similarly, the Fourth Circuit holds that "there can be no virtual representation where one of the parties to the first suit was not accountable to the nonparties who filed a subsequent suit." *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 652 (4th Cir. 2005). These statements are not just reflections of the circuits' "hesitan[cy] to embrace the term 'virtual representation' in cases where there is no clear relationship between the

litigants in successive suits," Fairchild Opp. 7; they are statements of law about when virtual representation applies—law that directly conflicts with the decision below. That Fairchild found one case in each of the two circuits in which a panel, without using the term "virtual representation" or discussing the circuits' case law on the doctrine, found plaintiffs in privity with their co-plaintiff relatives does not undermine the circuits' legal requirements for virtual representation.[1]

Fairchild's attempts to reconcile the circuit split over whether notice of the first case is required for a party to the second case to be bound fare no better. It tries to distinguish *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 761 (1st Cir. 1994), in which the First Circuit held that "virtual representation will not serve to bar a

---

[1]As demonstrated by the dissent in the Fourth Circuit case cited by Fairchild, *Eddy v. Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), if that case is viewed as a virtual representation case, it conflicts both with decisions of other circuits and with the Fourth Circuit's own case law. *Id.* at 684 (Michael, J., dissenting). The petition for certiorari in *Eddy* will be circulated to the Court on the same day as the petition in this case. *See* Pet. for Cert., No. 07-495. That the Court has before it, at the same time, two cases from different circuits with different underlying claims presenting similar questions on virtual representation demonstrates the importance of granting certiorari to clarify the scope of the virtual representation doctrine. This case is a better vehicle than *Eddy* for doing so because *Eddy* does not present the question whether virtual representation can apply where the party to the second case received no notice of the first case. In *Eddy*, the precluded plaintiffs had notice of, and in fact testified in, the first suit.

nonparty's claim unless the nonparty has had actual or constructive notice of the earlier litigation," on the basis that *Gonzalez* noted that the parties did not share a special type of close relationship. Fairchild Opp. 9. But that fact is irrelevant to the split. Although the First Circuit found that actual or constructive notice is implicit in an express or implied legal relationship where the party to the first litigation is accountable to the party to the second, *Gonzalez*, 27 F.3d at 761, Herrick and Taylor, like the parties at issue in *Gonzalez*, did not (and do not) have such a relationship. And although the First Circuit found that the existence of actual or constructive notice was implicit in a finding of tactical maneuvering, *id.*, that does not mean, as Fairchild claims, that it held that tactical maneuvering "could provide 'constructive notice.'" Fairchild Opp. 9 n.2. Rather, because a person cannot tactically maneuver to avoid litigation of which he is unaware, that person cannot be found to have tactically maneuvered to avoid litigation unless he has *already* been found to have received notice of the litigation. Thus, a finding of tactical maneuvering *implies* that the court already found that notice was provided; it does not itself *provide* constructive notice.

Similarly, that the previous cases discussed in *Perez v. Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001), and *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), were class or group actions does not reconcile their outcomes with the decision below or otherwise undermine their holdings that virtual representation cannot apply unless the party to the second litigation received notice of the first litigation. *See Perez*, 247 F.3d at 312; *Tice*, 162 F.3d at 973. *Perez* and *Tice* were not about the procedural safeguards afforded class members in the class action context; they were about whether people who were *not* members of the class were nonetheless bound by its results. In other words, like

this case, those cases considered when plaintiffs can be precluded from litigating their cases based on prior litigation to which they were not parties, and they concluded that virtual representation requires, at a minimum, that the party to the second case have received notice of the first case.

In short, although Fairchild's statement that whether notice is necessary for virtual representation "depends on the factual circumstances of each case," Fairchild Opp. 9, is currently true in the D.C. Circuit, it is *not* true in either the First or Seventh Circuit. Fairchild's emphasis on the facts of particular cases cannot hide that there is a strong *legal* disagreement between the circuits.

2. Unlike Fairchild, the government does not dispute that the circuits are split over virtual representation. Rather, it claims that this case is not a good vehicle for resolving the splits because it is an example of so-called "public-law" litigation, whereas the cases cited in the petition involved "private-law" claims. Gov't Opp. 13. Contrary to the government's assertion, however, a distinction between "public" and "private" law does not reconcile the conflicting cases. *See NAACP v. Fordice*, 105 F.3d 655, 1996 WL 767432, at *3 (5th Cir. Dec. 23, 1996) (unpublished) (applying the Fifth Circuit's standard test for virtual representation, which requires "an express or implied legal relationship," in a voting-rights case). And although both the government and Fairchild argued to the D.C. Circuit that the supposed public-law nature of this case favored a finding of virtual representation, the D.C. Circuit did not rely on a purported distinction between "public" and "private" law in justifying its ruling, and the legal rule it set forth presumably would apply in both "public" and "private" law cases.

Moreover, the government acknowledges that the Ninth Circuit squarely rejected the "public-law" theory in *Headwaters, Inc. v. United States Forest Service*, 399 F.3d 1047, 1054 (9th Cir. 2005). *See* Gov't Opp. 10 n.2. Thus, the government's purported reconciliation of the disparate circuit precedents itself depends on a legal proposition on which the circuits are split. That the government's attempt to explain away the conflict requires it to dismiss the Ninth Circuit's leading precedent on virtual representation as wrong itself demonstrates why review by this Court is necessary to resolve the disarray among the lower courts.

In any event, the government's whole public/private-law distinction rests on a misreading of *Richards v. Jefferson County*, 517 U.S. 793 (1996). In *Richards*, a challenge to a county tax, the Court rejected the defendants' argument that "in cases raising a public issue of this kind, the people may properly be regarded as the real party in interest and thus that petitioners received all the process they were due." *Id.* at 803. Although the defendants had asserted that "the character of their action render[ed] the usual constitutional protections inapplicable," *id.* at 802-03, the Court found that the case was one "in which the State may not deprive individual litigants of their own day in court." *Id.* at 803.

As the government notes, *Richards* did recognize a category of taxpayer cases in which states could limit the number of judicial proceedings. *Id.* Such cases—those in which the taxpayer is complaining about general misuse of public funds or some other action that only indirectly affects him—are too abstract to be protected by due process requirements. State courts can deny standing altogether to taxpayers bringing such cases, which, because of Article III requirements, are not even entertained in federal courts. *See generally*

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006). However, like *Richards* itself, this case is not in that category. Although the purpose of the Freedom of Information Act (FOIA) is to provide the public with information, under FOIA, each person denied records has suffered a personal injury and, after exhausting the administrative process, has standing to sue. *See* 5 U.S.C. § 552(a)(4)(B); *see also FEC v. Akins*, 524 U.S. 11, 21 (1998) (describing inability to obtain information as a "concrete and particular" "injury in fact").

3. Respondents' other attempts to reconcile the opinion below with this Court's precedents are similarly unavailing.

a. Both respondents claim that the decision below is consistent with *Richards* because the litigants in *Richards* were "mere 'strangers.'" *Richards*, 517 U.S. at 802. However, although Herrick and Taylor are acquainted with each other, they have no legal relationship with each other. As in *Richards*, there is no reason to suppose that the *Herrick* court "took care to protect the interests of petitioner[] in the manner suggested in *Hansberry* [*v. Lee*, 311 U.S. 32 (1940)]. Nor is there any reason to suppose that [Herrick] understood" his suit to be on behalf of Taylor. *Id.* at 802.[2] Herrick and Taylor lack the "special representational relationship" necessary for a finding of privity under this Court's case law. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999). And if the Court had left open the question of what sort of relationship would allow a litigant to be bound by prior litigation to which

---

[2]Fairchild incorrectly claims that the D.C. Circuit found that Herrick and Taylor "collaborated with each other in bringing successive lawsuits." Fairchild Opp. 11. The D.C. Circuit made no such finding.

he was not a party, the need to answer that question would, alone, justify granting review.

b. Respondents also claim that the decision below can be reconciled with the notice requirement in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), because, in their view, *Richards* left open the possibility that notice was not necessary in virtual representation cases. Fairchild Opp. 11; Gov't Opp. 11. What *Richards* said, however, was that "even assuming our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation may cure a lack of notice, but cf.. . . *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S., at 39 . . . it may not be read to permit the application of res judicata here," where the taxpayers in the first suit, "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties." *Richards*, 517 U.S. at 801. Here, as in *Richards*, the first litigation was not a class action and did not purport to be one.

Further, by its use of "but cf.," the Court in *Richards* demonstrated its recognition that reading *Hansberry* to leave open the possibility that adequate representation could cure a lack of notice in some class suits potentially conflicts with *Mullane*. Neither respondent addresses that conflict.

Finally, if *Richards* did leave open the question whether notice is necessary in virtual representation cases, then this Court should grant the petition to answer the question *Richards* did not answer, and that has divided the lower courts: Can a party can be precluded from bringing a claim under a theory of virtual

representation when the party received no notice of the prior litigation?

In sum, the courts of appeals are split, those splits are case-dispositive, and the case presents important due process questions about when a litigant can be denied the right to a day in court. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Adina H. Rosenbaum
Brian Wolfman
Counsel of Record
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street., NW
Washington, DC 20009
(202) 588-1000

Michael John Pangia
THE LAW OFFICES OF
MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

December 2007 Counsel for Petitioner

JOINT APPENDIX

744

85

100pgs

(5)

No. 07-371

FILED
FEB 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PAUL D. CLEMENT*
SOLICITOR GENERAL
U.S. DEPARTMENT OF JUSTICE
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel for Federal Respondent

BRIAN WOLFMAN*
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
brian@citizen.org
(202) 588-1000

CATHERINE E. STETSON*
HOGAN & HARTSON L.L.P.
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5491
cestetson@hhlaw.com
Counsel for Respondent Fairchild Corp.

MICHAEL J. PANGIA
1717 N St., NW
Washington, DC 20036
(202) 955-6450
Counsel for Petitioner

* Counsel of Record

Petition for Writ of Certiorari Filed September 17, 2007
Certiorari Granted January 11, 2008

TABLE OF CONTENTS

Relevant docket entries

United States District Court for the District of Columbia, No. 03-cv-173 1

United States Court of Appeals for the District of Columbia Circuit, No. 05-5279 9

Complaint, *Taylor v. Blakey*, United States District Court for the District of Columbia, No. 03-cv-173, filed February 3, 2003 (Docket Entry 1) 14

Exhibit A: FOIA Request by Brent Taylor, dated August 22, 2002 20

Exhibit B: FOIA Appeal, dated November 25, 2002 22

Plaintiff's Motion to Allow Discovery, United States District Court for the District of Columbia, No. 03-cv-173, filed January 5, 2004 (Docket Entry 14) . . . 24

Exhibits to Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Allow Discovery, United States District Court for the District of Columbia, No. 03-cv-173, filed January 20, 2004 (Docket Entry 15) 37

Exhibit A: Letter Denying FOIA Request, dated July 7, 2003 38

Exhibit B: FOIA Appeal, dated July 17, 2003 42

Exhibit C: Letter Denying FOIA Appeal, dated October 10, 2003 45

Statement of Material Facts as to Which There Is No Genuine Issue in Support of Fairchild Corporation's Motion for Summary Judgment, United States District Court for the District of Columbia, No. 03-cv-173, filed January 10, 2005 (Docket Entry 27-4) 53

Exhibits and Attachments to Defendant's Motion for Summary Judgment, United States District Court for the District of Columbia, No. 03-cv-173, filed January 10, 2005 (Docket Entry 29) 58

Exhibit 1: Complaint, *Herrick v. Garvey*, No. 99-cv-0234 (D. Wyo.) 59

Attachment to Exhibit 1: FOIA Request by Greg Herrick, dated November 14, 1997 65

Attachment to Exhibit 1: Letter Denying FOIA Request, dated December 12, 1997 66

Attachment to Exhibit 1: FOIA Appeal, dated January 28, 1998 68

Attachment to Exhibit 1: Letter Denying FOIA Appeal, dated October 26, 1998 73

Exhibit 7: Declaration of Vito A. Pulera, dated July 13, 2000 76

Memorandum Opinion Denying the Plaintiff's

Motion for Relief From Judgment and Rendering Sanctions Inappropriate, United States District Court for the District of Columbia, No. 03-cv-173, dated February 6, 2006 (Docket Entry 53) 81

The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Memorandum Opinion of the United States District Court for the District of Columbia, No. 03-cv-173, dated May 12, 2005 ..... 22a

Order of the United States District Court for the District of Columbia, No. 03-cv-173, dated May 12, 2005 ..... 37a

Decision of the United States Court of Appeals for the District of Columbia Circuit, No. 05-5279, dated June 22, 2007 ..... 1a

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00173-RMU

TAYLOR v. BLAKEY Date Filed: 02/03/2003

DOCKET ENTRIES

Filing Date	#	Docket Text
2/03/2003	1	COMPLAINT against MARION BLAKEY (Filing fee $ 150.), filed by BRENT TAYLOR. (Attachments: # 1 Exhibit A# 2 Exhibit B-C)(mpt,) Modified on 2/10/2003 (mpt,). (Entered: 02/10/2003)02/03/2003
		* * * * *
4/18/2003	5	Joint MOTION to Stay by MARION BLAKEY, BRENT TAYLOR. (Harvey, G.) (Entered: 04/22/2003)
		* * * * *
4/28/2003	8	ORDER granting 5 parties' Joint Motion to Stay. Signed by Judge Ricardo M. Urbina on 4/28/03. (Entered: 04/28/2003)04/28/2003
		* * * * *
10/28/2003	11	ANSWER to Complaint by MARION BLAKEY.(Barsoomian, Lisa) (Entered: 10/28/2003)
		* * * * *
1/05/2004	14	MOTION for Discovery by BRENT

		TAYLOR. (Attachments: # 1 Supplement Memorandum in Support of Plaintiff's Motion to Allow Discovery# 2 Exhibit Plaintiff's Interrogatories to Defendant# 3 Exhibit Plaintiff's Supplemental Interrogatories to Defendant# 4 Exhibit Notice for Production of Documents# 5 Exhibit Plaintiff's Second Supplemental Interrogatories to Defendant# 6 Text of Proposed Order Order)(Pangia, Michael) (Entered: 01/05/2004)
1/20/2004	15	Memorandum in opposition to motion re 14 Plaintiff's Motion to Allow Discovery filed by MARION BLAKEY. (Attachments: # 1 # 2 # 3 # 4 # 5 # 6)(Barsoomian, Lisa) (Entered: 01/20/2004)
		* * * * *
8/03/2004	17	ORDER denying 14 Motion for Discovery. Signed by Judge Ricardo M. Urbina on 8/3/04. (Entered: 08/03/2004)
8/03/2004	18	MEMORANDUM OPINION. Signed by Judge Ricardo M. Urbina on 8/3/04. (Entered: 08/03/2004)
		* * * * *
10/15/2004	21	MOTION to Intervene as a Defendant by FAIRCHILD CORPORATION. (Attachments: #

		Exhibit # Text of Proposed Order)(nmw,) Additional attachment(s) added on 10/18/2004 (nmw,). (Entered: 10/18/2004)
10/22/2004	22	RESPONSE to *Fairchild's Motion to Intervene* filed by BRENT TAYLOR. (Pangia, Michael) (Entered: 10/22/2004)
10/29/2004	23	REPLY to opposition to motion re 21 to intervene filed by FAIRCHILD CORPORATION. (Yinger, Emily) (Entered: 10/29/2004)
		* * * * *
11/15/2004	25	MEMORANDUM ORDER granting 21 Motion to Intervene. Signed by Judge Ricardo M. Urbina on 11/15/04. (jp,) (Entered: 11/15/2004)
		* * * * *
1/10/2005	27	MOTION for Summary Judgment by FAIRCHILD CORPORATION. (Attachments: # 1 Exhibit Exhibits to Memorandum in Support of SJ# 2 # 3 # 4 # 5 # 6)(Yinger, Emily) (Entered: 01/10/2005)01/10/2005
		* * * * *
1/10/2005	29	MOTION for Summary Judgment by MARION BLAKEY. (Attachments: # 1 Exhibit

		Wyoming Complaint & Attachments# 2 Exhibit Miller Affidavit# 3 Exhibit Corbett Letter# 4 Exhibit Pangia Letter# 5 Exhibit Leverenz Letter# 6 Exhibit Pulera Declaration (Part 1)# 7 Exhibit Pulera Declaration (Part 2)# 8 Exhibit Jackson Declaration# 9 Exhibit Hutcherson Declaration# 10 Text of Proposed Order)(Blumberg, Peter) (Entered: 01/10/2005)
1/10/2005	30	MOTION to Dismiss by MARION BLAKEY (for scanned image, see doc. 29). (cp,) (Entered: 01/11/2005)
1/10/2005	31	ANSWER to Complaint by FAIRCHILD CORPORATION.(Burgess, Joe) (Entered: 01/11/2005)
1/10/2005	32	LCvR 7.1 - CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by FAIRCHILD CORPORATION (Burgess, Joe) (Entered: 01/11/2005)
1/11/2005	33	AMENDED ANSWER to Complaint by MARION BLAKEY.(cp,) (Entered: 01/11/2005)
1/21/2005	34	Memorandum in opposition to motion re 27 dismiss and motion for summary judgment filed by

		BRENT TAYLOR. (Pangia, Michael) (Entered: 01/21/2005)
3/21/2005	37	REPLY to opposition to motion re 29 Motion to Dismiss or for Summary Judgment filed by MARION BLAKEY. (Blumberg, Peter) (Entered: 03/21/2005)
		* * * * *
4/04/2005	38	REPLY to opposition to motion re 29 Motion to Dismiss or for Summary Judgment filed by FAIRCHILD CORPORATION. (Yinger, Emily) (Entered: 04/04/2005)
		* * * * *
5/12/2005	40	ORDER granting 27 Motion for Summary Judgment by defendant Fairchild Corporation, granting 29 Motion for Summary Judgment by defendant Marion Blakey. Signed by Judge Ricardo M. Urbina on 5/12/05. (jp) Modified on 5/12/2005 (jwd). (Entered: 05/12/2005)
5/12/2005	41	MEMORANDUM OPINION. Signed by Judge Ricardo M. Urbina on 5/12/05. (jp,) (Entered: 05/12/2005)
		* * * * *
5/31/2005	42	RESPONSE to Order Memorandum filed by BRENT

		TAYLOR. (Attachments: # 1 Affidavit Plaintiff# 2 Affidavit Michael J. Pangia)(Pangia, Michael) (Entered: 05/31/2005)
5/31/2005		MINUTE ORDER. The court will treat the plaintiff's recent filing as a motion for reconsideration, the resolution of which will determine, inter alia, whether plaintiff and his lawyer have shown cause as to why they should not split the costs of defendant-intervenor Fairchild and defendant FAA. Accordingly, the defendants shall submit an opposition and the plaintiff shall submit a reply, if any, in accordance with the local rules. The court notes that defendant-intervenor Fairchild and defendant FAA have failed thus far to submit a statement of costs. Signed by Judge Ricardo M. Urbina on 5/31/05. (jp,) (Entered: 05/31/2005)
		* * * * *
6/14/2005	44	RESPONSE to Plaintiff's Motion for Reconsideration filed by FAIRCHILD CORPORATION. (Yinger, Emily) (Entered: 06/14/2005)
6/14/2005	45	RESPONSE to Plaintiff's Motion for Reconsideration filed by MARION BLAKEY. (Attachments:

		# 1 Text of Proposed Order)(Blumberg, Peter) (Entered: 06/14/2005)
6/20/2005	46	REPLY to 42 Reply to Defedants' Responses to Plaintiff's Response to Court's Order to Show Cause filed by BRENT TAYLOR. (Pangia, Michael) (Entered: 06/20/2005)
		* * * * *
7/06/2005	50	NOTICE OF APPEAL as to 41 Memorandum & Opinion entered on 05/12/05 by BRENT TAYLOR. Filing fee $ 255, receipt number 136017. (jf,) (Entered: 07/08/2005)
7/08/2005		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 50 Notice of Appeal (jf,) (Entered: 07/08/2005)
8/02/2005		USCA Case Number 05-5279 for 50 Notice of Appeal filed by BRENT TAYLOR,. (rje,) (Entered: 08/02/2005)
		* * * * *
2/06/2006	52	ORDER denying 42 Motion for Reconsideration. Signed by Judge Ricardo M. Urbina on 2/6/06. (djr) (Entered: 02/06/2006)
2/06/2006	53	MEMORANDUM AND OPINION. Signed by Judge Ricardo M. Urbina on 2/6/06. (djr) (Entered:

		02/06/2006)
8/15/2007	54	MANDATE of USCA (certified copy) as to 50 Notice of Appeal filed by BRENT TAYLOR affirming the judgment of the District Court; opinion attached. (jeb) (Entered: 08/22/2007)

U.S. Court of Appeals for the D.C. Circuit
D.C. Circuit Court of Appeals
Court of Appeals Docket #: 05-5279 Filed: 7/29/05

Taylor, Brent v. Blakey, Marion

DOCKET ENTRIES

Filing Date	Docket Text
7/29/05	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Brent Taylor. [909512-1] (lvs)
	* * * * *
9/27/05	MOTION filed (5 copies) (certificate of service by mail dated 9/26/05) for leave to file brief as amicus curiae in support of appellant [925427-1]. Motion filed by the Movant Amicus Curiae Experimental Aircraft Association, Inc. (jth)
	* * * * *
9/27/05	MOTION filed (5 copies) (certificate of mail service dated 9/27/05) for leave to participate as an amicus curiae in support of Appellant [925438-1]. Motion filed by the Movant Amicus Curiae Public Citizen, Inc. (jth)
	* * * * *
10/18/05	CLERK'S ORDER filed [925460-1] granting the motions of Experimental Aircraft Association, Inc. [925427-1], and Public Citizen, Inc. [925438-1] for leave to participate as amicus curiae in favor of appellant. [Entry Date: 10/18/05] (jth)

* * * * *

3/27/06	MOTION lodged (5 copies) by Appellee Fairchild Corp (certificate of service dated 3/27/06, by mail) for summary affirmance [959560-1]. (lvs)
3/27/06	MOTION lodged (5 copies) by Appellee Fairchild Corp (certificate of service dated 3/27/06, by mail) for attorney fees and costs [961604-1]. (lvs)

* * * * *

4/5/06	OPPOSITION lodged [963000-1] (5 copies) by Appellant Brent Taylor (certificate of mail service dated 4/4/06) to a motion for summary affirmance [959560-1]. (hts)
4/11/06	OPPOSITION lodged [963837-1] (5 copies) by Amicus Curiae for Appellant Pub Ctzn Inc (certificate of mail service dated 4/11/06) to a motion for summary affirmance [959560-1]. Styled as ("Memorandum of Amicus Curiae Public Citizen in Opposition to Appellee Fairchild Corporation's Motion for Summary Affirmance"). (hts)

* * * * *

4/17/06	REPLY lodged [963031-1] (5 copies) by Appellee Fairchild Corp (certificate of mail service dated 4/17/06) to a response to the motion for summary affirmance [959560-1].(hts)
4/26/06	OPPOSITION filed [967016-1] (5 copies)

by Appellant Brent Taylor (certificate of mail service dated 4/26/06) to a motion for attorney fees [961604-1] and MOTION filed for leave to file [967016-2] the response to the motion for attorney fees [967016-1]. (hts)

6/13/06 BRIEF filed by Appellant Brent Taylor [974730-1]. Copies:15. Certificate of service date 6/13/06, hand-delivery. (lvs)

6/13/06 JOINT APPENDIX filed by Appellant Brent Taylor [974734-1]. Copies: 10. (lvs)

* * * * *

8/7/06 PER CURIAM ORDER filed [984420] denying motion for summary affirmance [959560-1] filed by Fairchild Corp. It is FURTHER ORDERED that the motion for attorney fees[961604-1] be denied. It is FURTHER ORDERED that the motion for leave [981648-1] to supplement appellant's response to appellee's motion for summary affirmance be dismissed as moot. Before Judges Sentelle, Brown, Kavanaugh. [Entry Date: 8/7/06] (mcm)

* * * * *

9/5/06 BRIEF filed by Amicus Curiae for Appellant Expmtl Aircrft Assn [989680-1]. Copies: 15. Certificate of mail service 9/5/06. (krm)

9/5/06 BRIEF filed by Amicus Curiae for Appellant Pub Ctzn Inc [995525-1]. Copies: 15. Certificate of mail service date 9/5/06. (krm)

* * * * *

10/26/06	BRIEF filed by Appellee Marion C. Blakey [1001935-1] . Copies: 15 . Certificate of service date 10/26/06 . (smc)
10/26/06	BRIEF filed by Appellee Fairchild Corp [1002327-1]. Copies: 15. Certificate of mail service date 10/26/06. (krm)
12/1/06	REPLY BRIEF filed by Appellant Brent Taylor [1009964-1]. Copies: 15. Certificate of mail service date 12/1/06. (krm)
2/2/07	ORAL ARGUMENT HELD before Ginsburg, Griffith, Williams (set)

* * * * *

6/22/07	JUDGMENT for the reasons in the accompanying opinion affirming [1048824-1] the decision of the district court. Before Judges Ginsburg, Griffith, Williams . [Entry Date: 6/22/07] (mam)
6/22/07	OPINION filed [1048825] (22 pgs) for the Court filed by Judge Ginsburg (mam)

* * * * *

8/8/07	MANDATE ISSUED to Clerk, District Court [1059414-1] (mcm)

* * * * *

9/21/07	NOTICE filed by Case Analyst, Erik Fossom, Supreme Court of the United States, Office of the Clerk, that the petition for a writ of certiorari was filed on September 17, 2007 and placed on the

docket September 19, 2007, No. 07-371 [1069995-1]. (lvs)

1/17/08 LETTER filed by U.S. Supreme Court re: the petition for a writ of certiorari is granted [1093586-1]. (See letter for briefing schedule) (joet)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR,

2201 Bluegrass Road
Ottumwa, Iowa 52501

PLAINTIFF

v.

MARION BLAKEY,

Administrator,
Federal Aviation Administration,
800 Independence Avenue, SW
Washington, DC 20591

DEFENDANT

FREEDOM OF INFORMATION ACT COMPLAINT

Plaintiff, Brent Taylor, as and for his complaint against Marion Blakey, Administrator, Federal Aviation Administration (herein after "FAA"), state as follows:

1. This is an action pursuant to the Freedom of Information Act, 5 USC § 552 et seq ("FOIA") as amended, demanding the FAA to produce certain records within its possession and control pertaining to a 1935 vintage airplane.

2. The plaintiff, Brent Taylor, is an individual who is a citizen and resident of the State of Iowa and is a

citizen of the United States of America. He is the president of the Antique Airplane Association, dedicated to the preservation of vintage aircraft and aviation heritage.

3. The FAA is a Federal agency of the United States established by statute.

4. This court has jurisdiction over this dispute pursuant the 28 USC § 131, Federal question, and 5 USC § 552, et seq the Freedom of Information Act ("FOIA").

5. Venue in this Court is proper pursuant to 5 USC § 552 (a)(4)(13) which directs a complainant to file an action in, among other permitted places, the District of Columbia.

6. On August 22, 2002, the plaintiff sent a letter, pursuant to FOIA, to the FAA requesting copies of the entire file pertaining to the type certificate of an aircraft known as the Fairchild F 45 (Type certificate no. 603 issued in the mid 1930s). This file should include applications for the type certificate, transfers of the ownership of the type certificate, any waivers of any trade secret status that may be contained in that file, and any correspondence, letters, or notations of any kind withdrawing, rescinding, or modifying any waiver of trade secret status. The plaintiff also requested plans, blueprints, specifications, engineering drawings and data submitted in support of the Type Certificate for the Fairchild F 45 (Type certificate 603). The letter is enclosed as Exhibit A.

7. To date, the FAA has not responded to the request in Exhibit A.

8. On November 25, 2002, the plaintiff appealed the non-response to the FAA, attached as Exhibit B.

9. To date, the FAA has not responded to the Exhibit B appeal and therefore, pursuant to Department of Transportation Regulations, 49 CFR part 7, which implements the FOIA, the plaintiff has exhausted his administrative remedies.

10. The FAA is the custodian of copies of drawings and other data submitted in 1935 by Fairchild Engine and Airplane Corporation, manufacturer of an aircraft known as a Fairchild F 45 in order to support an application for an Approved Type Certificate prior to production of the proposed aircraft for sale to the public.

11. The Fairchild Engine and Airplane Corporation, no longer in existence, was awarded Approved Type Certificate No. 603 on April 29, 1936 by the Civil Aeronautic Authority, the predecessor to the FAA.

12. The FAA maintains records in which are kept aircraft type certificates, transfers of type certificates, and directions and approvals from the type certificate holders to release drawings and other information to the public, and maintains such a record file pertaining to this subject aircraft.

13. In 1955, the owner of the subject type certificate and supporting drawings and data released these documents to the public and thereafter this material lost any trade secret status it may have had. A true copy of this release is attached as Exhibit C.

14. The manufacturer of the F 45 aircraft ceased production in 1939 and the aircraft was never produced since.

15. The United States Court of Appeals for the Tenth Circuit, in the case of Greg Herrick v. Jane Garvey, Administrator, Federal Aviation Administration 298 F.3d 1884 held that because of the subject release (Exhibit C) "those documents are no longer 'secret' for the purposes of Exemption 4 [of the FOIA]." and that "[i]n such a situation, FOIA creates an obligation for the government to release the documents." 298 F.3d at 1193, 1194.

16. The United States Court of Appeals for the Tenth Circuit nevertheless denied access to Greg Herrick on the grounds that he failed to challenge a proposition that this releasable public information can possibly be remade into a secret. 298 F.3d at 1194, fn 10.

17. A secret, by definition, cannot be made from information that has been in the public domain since 1955.

18. The FAA file pertaining to the subject type certificate and supporting data contains no withdrawal, retraction or modification of the 1955 release of the subject material to the public.

19. The transfer of ownership of an aircraft type certificate is a regulated event pursuant to 14 CFR 21.47.

20. The FAA file for the subject type certificate and supporting data contains no transfer of ownership in compliance with 14 CFR 21.47 to any presently existing person or entity.

21. In order for material to be a trade secret it must be shown that the claimed owner has continually guarded it as a trade secret.

22. Notwithstanding the fact that the subject material concerning the F 45 aircraft ceased being a trade secret since its release to the public in 1955, no person or entity has taken necessary steps to regain and guard the secrecy by at least either a transferring of ownership pursuant to 14 CFR 21.47 and/or submitting to the subject FAA type certificate file a withdrawal, rescission or modification of the 1955 release.

23. The FAA has no basis under the FOIA for withholding the right of access to the subject documents.

24. The failure of the FAA to release the subject documents constitutes a violation of the FOIA.

25. The plaintiff has incurred personal expense in filing his FOIA request, appeal and this action against the FAA, including attorneys fees.

26. Subsection (a)(4)(E) of the FOIA permits the prevailing party to recover attorneys fees.

WHEREFORE plaintiff Brent Taylor, requests the Court to:

1. Order the FAA to produce the requested documents pertaining to the 1935 Fairchild F 45 aircraft.

2. Allow the plaintiff to recover attorney's fees and expenses associated with this action.

3. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/_____

Michael J. Pangia
Attorney for the Plaintiff
1717 N Street, N.W.
Washington, D.C. 20036
(202)955-6450
D.C. Bar No. 967182

Brent Taylor
22001 Bluegrass Road
Ottumwa, Iowa 52501-8569

8-22-02

Federal Aviation Administration
Production and Airworthiness Division, AIR-200,
Suite 815
800 Independence Ave., SW
Washington, D.C. 20591

RE: FOIA Request

Dear Sir/Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. 552 et seq, I am requesting copies of the following information and documents contained in files of the Federal Aviation Administration:

1. The entire file pertaining to the type certificate of an aircraft known as the Fairchild F 45 (Type certificate No 603 issued in the mid 1930s). This file should include applications for the type certificate, transfers of the ownership of the type certificate, any waivers of any trade secret status that may be contained in that file, and any correspondence, letters, or notations of any kind withdrawing, rescinding, or modifying any waiver of trade secret status.

2. Plans, blueprints, specifications, engineering drawings and data submitted in support of the Type Certificate for the Fairchild F 45 (Type certificate 603).

If there is a charge for copying these materials, please inform the undersigned who is willing to pay whatever copy charges are incurred.

Sincerely,

/s/_____
Brent Taylor

LAW OFFICES
of
MICHAEL J. PANGIA, P.C.
1717 N STREET, NW
WASHINGTON, D.C. 20036-2801

(202) 955-6450
(202) 955-9444 (Facsimile)
Pangia@law.com

Michael J. Pangia
Admitted D.C. & NY
NBTA Certified Trial
Specialist

Of counsel:
Law Offices of
William J. Apuzzo
685 Third Avenue
New York, NY 10017

Anderson, Korzen & Assoc.
233 West Mountain St.
Kernersville, NC 27284

November 25, 2002

FOIA Program Manager
Associate Administrator for Administration
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Re: Appeal of FOIA Request

Dear Sir/Madam:

I am representing FOIA requestor, Brent Taylor, who is hereby appealing the constructive denial of his FOIA request, copy attached. It was sent to the Federal Aviation Administration on August 22, 2002. He reports that no response has been received. This is an appealable denial for which we are requesting a reversal.

As a matter of background, this same information has been denied to another requestor, Greg Herrick, who appealed to the District Court for the District of Wyoming, then on losing appealed to the Court of Appeals for the Tenth Circuit. According to the decision (copy attached), the Court of Appeals held that this information is no longer a secret based upon a 1955 release by the owner (copy also attached). (See pages 15, 16, and 17 of the decision). Nevertheless, the Court of Appeals affirmed the lower court on an open question posed in footnote 10 of the decision as to whether this non-secret information that has been in the public domain since 1955 can be and has been remade into a secret again.

Therefore, the information is held to be non-secret, public information. Concerning what the Court of Appeals considered to be an open question we assert that the very definition of a secret, that it cannot be remade from information that has been in the public domain now for nearly half a century. Furthermore, we understand that there is nothing in the FAA file pertaining to the subject Type Certificate for the subject 1930's F-45 airplane that withdraws or modifies in any way the owner's 1955 letter contained in that file.

Therefore, we respectfully request your decision to release the requested material to Mr. Brent Taylor. He will be wiling to pay the expense of the copies.

Sincerely,

/s/ Michael J. Pangia
Michael J. Pangia
Enc.
cc: Brent Taylor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR	)	
	)	
Plaintiff	)	
v.	)	Civil No.
	)	03CV00173(RMU)
MARION BLAKELY,	)	ECF
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Defendant	)	
	)	

PLAINTIFF'S MOTION TO ALLOW DISCOVERY

The plaintiff, by undersigned counsel, hereby moves this honorable Court for an order, pursuant to Rule 26(b) of the Federal Rules of Civil Procedure, and for good cause allowing discovery in the Freedom of Information Act (FOIA) case because of the unusual circumstances surrounding the material sought and the proceedings involved. The plaintiff also requests further relief that in the interest of justice would be proper in this case.

__S_____
Michael J. Pangia, Esq. (D.C. Bar No. 967182)
LAW OFFICES OF MICHAEL J. PANGIA
1717 N Street, N.W.
Washington DC, 20036

Counsel for Plaintiff, Brent Taylor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR	)	
	)	
Plaintiff	)	
v.	)	Civil No.
	)	03CV00173(RMU)
MARION BLAKELY,	)	ECF
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Defendant	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION TO ALLOW DISCOVERY

It is submitted that this is a most unusual Fredom of Information Act (FOIA) case. While the materials sought are normally regarded as trade secrets and protected as such by owners registered with the Federal Aviation Administration (applicable regulations cited below), the particular materials sought in this case have been released for loan and made available to the public since 1955. For nearly a half a century now there appears to be no evidence that anyone has ever expressed interest in maintaining the trade secrecy of this material — the very essence of the definition of a secret being the owner's continuing manifestation of the intent to keep it secret.

In 1935, a company called The Fairchild Engine and Airplane Corporation designed and built a small airplane, part metal and part wood and fabric. It was called a Fairchild Model F-45. It had a radial engine (round

engine), built by Pratt & Whitney, that has not been in production now for about forty (40) years. About twelve (12) of these airplanes were built. It was certainly not a commercial success and production was stopped in 1939. This company was given what is called a Type Certificate for this aircraft by the Civil Aeronautics Agency (CAA), predecessor of the Federal Aviation Administration (FAA). Type Certification of an aircraft is covered by 14 C.F.R. Part 21 of the Federal Aviation Regulations. The applicant is required to submit drawings, specifications and data to the FAA to show that the minimum regulations for safety have been met. The design data and specifications are held by the FAA and form the basis of the Type Certificate.[1]

In 1955, the owner and submitter of this material notified the CAA that permission was no longer required to grant public access to this information and made it openly available to anyone who wanted to borrow it to

---

[1]The type certificate is inseparable from the underlying data and specifications submitted to the FAA, just like the deed to a piece of property is not an asset onto its own without the property. One cannot own the deed, but not own the property. One cannot transfer the type certificate to someone else and maintain the data as its own any more than one transfers a title to an automobile without transferring the automobile. The reason why this seeming truism is pointed out here is that it is anticipated that, for the sake of winning the case, the FAA may argue that the underlying specifications can be transferred without transferring the type certificate — like transferring a piece of land without transferring the deed. The notion would be not only absurd but also contrary to the Federal Aviation Regulations, 14 C.F.R. §21 .47(requirements for the transfer of a type certificate), 14 C.F.R. §21.41(mandating that the type certificate includes the type design) and 14 C.F.R. §21.31 (specifying that the type design includes at least the underlying drawings and specifications).

repair their airplanes. This written "waiver" of the secret status of this material was placed in the FAA file for the F-45. That file is like a docket and contains any transfers, notices, amendments and items of that nature pertaining to the type certificate. It does not contain the plans and specification that support the type certificate itself. The plans and specifications are voluminous and are kept in a different location. The docket-like file was obtained through discovery in the Herrick FOIA case, mentioned below, and it has already been adjudicated that as of the date of the 1955 notice contained in that file, the material sought "ceased to be a 'secret." Herrick v. Garvey, 298 F. 3d 1184 (10th Cir. 2002).

The Fairchild Engine and Aircraft Corporation ceased to exist, probably at some time in the late 50's. Some of the assets were acquired by successor corporations and entities, most of which bore the name of Fairchild in one form or another, and some assets were not transferred. Over the years, the various Fairchild named entities went through bankruptcies, mergers, consolidations, acquisitions, spin-offs and a host of other changes too numerous and complex to mention. The now existing company bearing the Fairchild name is The Fairchild Corporation located in Chantilly, Virginia, which came into existence in about 1990. They do not build aircraft. They seem to manufacture or own companies that manufacture some aircraft type fasteners and some other, non-aviation items. They also seem to engage in large real estate projects and developments. As far as the plaintiff has been able to ascertain, The Fairchild Corporation is mentioned nowhere in the records that are held by the FAA as being connected in any way with the F-45 type certificate. We believe that there is no evidence that The Fairchild Corporation ever met the regulatory mandate of the law, 14 C.F.R. §21.47 or that

it has ever made attempts to do so.

In all the transfers, mergers, bankruptcies, acquisitions and changes involving the Fairchild name, all transferred assets were listed right down to every nut and bolt. Where any transfer of an aircraft type certificate was involved there were endorsements, records of transfer and strict compliance with the regulations.[2] The type certificates for many antique aircraft were abandoned with the demise of the entities that owned them and the associated plans and specifications are customarily loaned to anyone who requests them. As of the date of the Herrick adjudication there is no evidence of which the plaintiff is aware that the necessary documents, as required by law for the transfer of the F-45 type certificate, were ever filed.

It is believed that only two of the F-45s exist today. One is owned by a Mr. Greg Herrick, who is in the process of repairing the aircraft as part of a museum collection to preserve a piece of aviation history. He needed the plans and specifications mainly for the tail assembly. As mentioned, the plans and specifications for these old antique aircraft are loaned on a regular basis, but it does require a great deal of effort on the part of the FAA to gather and copy them. Mr. Herrick agreed to pay the expense incurred by the FAA. However, the FAA, without regard to the transfer regulations which it is supposed to enforce, simply looked for an existing company with a Fairchild styled name and located this new entity called The Fairchild Corporation. Apparently, the ipse dixit response from that corporation was, in essence, "we own everything that was ever associated

---

[2]The plaintiff learned of these facts also from the discovery in the FOIA case brought by Mr. Herrick, as mentioned below.

with the Fairchild name" and they objected to the release of anything. Upon that word the FAA predicated its Exemption 4 refusal, and Mr. Herrick brought an FOIA case in the U.S. District Court for the District of Wyoming where he resides.

In that case, the FAA represented to the court that the part of the Exemption 4 they were relying on dealt strictly with the trade secret aspect and not with any commercial value argument. The court addressed the trade secret aspect of the Exemption and held, in essence, that since type certification materials are to be generally classified as secrets that, ipso facto, Exemption 4 applies. The court went on to declare, without citing any evidentiary basis, that the 1955 waiver of trade secret status had somehow been withdrawn.[3] Mr. Herrick appealed his case to the Court of Appeals for the 10th Circuit.

The argument in the 10th Circuit was interesting, to say the least. The FAA argued that, even though the material was in the public domain for all of these years,

---

[3]The withdrawal was apparently predicated on an affidavit obtained from the legal counsel of The Fairchild Corporation that contained many false statements about what the requested materials contained. Even the FAA's affidavit admittedly disagreed with a good portion of that affidavit. It turned out through other discovery of the corporation that the affiant who swore he was fully familiar with the content of the requested materials never even saw them. It seemed that no one in the company even knew what an F-45 even looked like, much less knew what secrets they were supposedly protecting over the years. The plaintiff tried to subpoena the affiant, but he successfully ducked it twice. In a pre-hearing motion before the magistrate, the affidavit was stricken. The question has always remained to this present day as to what document, what lawful transfer, what letter in the type certificate file for the F-45 the FAA has to prove that this material has been continually maintained or regarded as a trade secret since 1955.

it was never actually physically released. The Court pointed out to the FAA in the argument that a release is not accomplished by physically removing the material and placing it in the public square or turning it over to someone. Doing such an act would deprive other members of the public from having the intended access. A release is put into effect by allowing someone to look at the material, and that is exactly what the 1955 waiver did. By doing so, the owner declared to the world that they no longer intended to protect that information as a secret. Once one has done that, the materials do not fall under the definition of a secret any longer. This proposition makes sense because embodied in the whole concept of what is a secret is the effort the supposed owner has made to perfect ownership and the steps taken to continually maintain secrecy, otherwise the information is no longer considered a secret. See Phillips v. Frey, 20 F.3d 623 (5th Cir. 1994) and Interiox America v. PPG Industries, Inc. 736 F. 2d 194 (5th Cir. 1984) (both cases hold to the established concept that one who either voluntarily discloses information or who fails to take reasonable steps to ensure its secrecy cannot be heard to claim at some future time that the information still continues to be a trade secret.), Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W. 2d 890, 901 (Minn.1983) (reasonable continuous efforts to maintain secrecy involve combination of physical security and confidentiality procedures that signal the secret nature of the information). See also Northwest American Airlines v. American Airlines, 853 F. Supp 1110, 1115 (D.Minn. 1994) (intention to keep information confidential is an insufficient basis for trade secret protection; owner must prove reasonable continuing measures to guard the secret). With respect to the information request on the F-45, the 10th Circuit made it clear that the holder, by the

public release in 1955, no longer intended this material to be a secret and that it has been in the public domain since that time. The Court with reference to the requested material stated as follows:

> We therefore conclude that where the submitter or owner of documents held by the government grants permission to loan or release those documents to the public, those documents are no longer "secret" for the purposes of Exemption 4. In such a situation, FOIA creates an obligation for the government to release the documents. When Fairchild granted permission to the CAA to loan the documents to individuals who requested them, for the purposes of the FOIA the documents ceased to be "secret." 298 F. 3d at 1194 (emphasis added).

Nevertheless, the 10th Circuit affirmed the lower court, stating that the plaintiff-appellant failed to challenge the lower court's legal conclusion that the materials have been effectively made into a secret again by action of the newly claimed owner, The Fairchild Corporation. The Court hypothesized in a footnote that if the status of the documents is to be determined at the time of the request, then it would have been too late to remake them into a secret. If it were to be determined by the time of the final decision, then it was not too late, that essentially the bell could be un-rung. 298 F. 3d at 1194 fn 10. Mr. Herrick does not agree, of course, that the issue turns on such hypotheses that are unsupported by published procedures or agency policy. Rather the issue should be whether it makes any sense in the first place that a secret can be reclaimed from the public domain after nearly a half a century, particularly by an entity that has not even bothered to comply with the law

involving transfers of type certificates even after notice through litigation. Moreover, engaging in such hypotheses glosses over a more fundamental question as to what is a secret in the first place. Nevertheless, the Court held that, because Mr. Herrick did not address this hypothetical argument, for the purposes of the case "we assume," as the Court phrased it (without noting any evidentiary basis), that The Fairchild Corporation effectively reacquired a secret from the long-standing public domain.[4]

Mr. Herrick has now requested Mr. Brent Taylor to assist him with the repair of his aircraft. Mr. Taylor is the president of the Antique Aircraft Association, the members of which are dedicated to the preservation of old aircraft as a part of our American heritage. In view of the fact that it has already been adjudicated that this material ceased being a secret in 1955, and the fact that there seems to be no follow up on taking the minimum steps required by the regulations to treat it as secret, he requested that the FAA loan the material to him under the FOIA. His request was refused, so he brings the present action and served on the FAA a set of interrogatories and a request for production of documents (Copies of the discovery already served are attached as Exhibits A, B and C. The plaintiff is also attaching a supplemental request, Exhibit D, asking for

---

[4]Since there was no factual basis cited by the lower court as to what exactly constituted a revocation of the 1955 letter in the FAA files, a remand would have been appropriate in the plaintiff's view. A district court's failure to provide sufficient factual detail for appellate review requires a remand. Summers v. Dept. of Justice, 140 F.3d 1077 (D.C. Cir. 1998). We submit that the "we assume" basis of the Circuit Court was wrong and disregards where the burden of proof lawfully belongs in such cases.

any established policy or procedure that the agency may have regarding the steps required to regain secrecy of material that has at one time ceased to be a secret). The plaintiff would also request depositions if answers to interrogatories do not satisfy the open questions on the issue of classification. The FAA does wish to respond to the discovery, but would rather simply rely on motions for summary judgment under general rules and procedures of Exemption 4.

The plaintiff recognizes the general policy that discovery is not ordinarily allowed in FOIA cases. The reason why discovery is so limited in FOIA cases, including Exemption 4 cases, is obvious. A requester must be afforded the greatest opportunity to challenge the government's classifications and assertions without jeopardizing the secrecy of the information itself. c.f. Vaughn v. Rosen 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). That concern, however, does not exist here. The plaintiff is not seeking through discovery the alleged reconstituted secrets contained in the requested plans and specifications for the F-45. It appears that the FAA does not even have to "Vaughn" reference that material to answer the discovery in this case. It is the unambiguous policy of the FOIA to give the fullest possible disclosure of government records. The court must be fully satisfied that the specific documents fall within the appropriate and narrowly construed exemption. Founding Church of Scientology, Etc. v. Bell, 603 F2d 945,949,950 (D.C. Cir 1979). In this case the court must be satisfied that the materials have been actually remade into a secret, by what published agency policy and procedure this can be done, and whether there is an adequate factual showing that the submitter or owner of the material demonstrated a continuous effort in guarding the supposed secret in the first place.

c.f. Schaffer v. Kissinger 505 F.2d 389, 391 (D.C. Cir. 1974)(discovery permitted to determine proper classification of documents under FOIA Exemption 1). Silverberg v. Department of Health and Human Services, 1990 WL 599452 (D.D.C.)(allowing discovery of alleged privileged material in an Exemption 4 case on grounds that the information was already divulged).

The FAA has the burden of proof in these cases. 5 U.S.C. 552 (a)(4)(B). Conclusionary assertions of non-disclosure will not suffice to carry the government's burden of proof in defending FOIA cases and thus government agencies must supply courts with sufficient information to allow a reasoned determination that they were correct in withholding information. Coastal States Gas Corp. v. Department of Energy. 617 F.2d 854,861 (D.C. Cir. 1980). In this case particularly, in view of what has been adjudicated, the FAA has the specific burden of proving that the information meets the very basic definition of a secret in the first place. If it is possible that this information which has been in the public domain for nearly a half a century has effectively been remade into a secret, it would seem that they should tell us exactly how such a thing can be accomplished, what published policy and procedure would allow such a thing and finally, if it can be accomplished, how it was done in this case. Is there some kind of a policy or precedent for how one goes about re-acquiring public information? Can it be done by an entity that has not complied with the transfer regulations, or can the FAA simply gloss over its regulations in this regard for the purpose of winning the case at hand? Citizens have a right to know the answers to these questions and specifically what has been taking place with this material. Simply denying discovery followed by summary judgment motions with canned briefs in a case such as this with so many open questions

would certainly be an expedient resolution for the FAA. The result would undoubtedly be an automatic negative, but it would leave the cloud of mystery surrounding the classification of these documents. It is submitted that the Court should be given answers to many of these open questions in order to render an intelligent and fair decision, not one based on assumptions and generalities.

We stress again that the information requested in the discovery served on the government in this case does not delve into the plans and specifications. None of the information requested in the discovery herein is or ever was a secret. The discovery is aimed at the basis for the FAA's decision with regard to these particular documents in view of what has taken place with them since 1955. The discovery sought does not itself fall into any FOIA exception, but the plaintiff should not have to seek it by a separate FOIA procedure since it meets the relevancy requirements of FRCP Rule 26. The FAA files which contained the 1955 letter were already produced in the Herrick case, but we do not know what has been filed since, particularly since The Fairchild Corporation has been put on notice of its regulatory deficiencies regarding type certificate transfers.

It would seem that an attempt to withdraw the written waiver of a secret should be evidenced by something in the type certificate file as a minimum step to show a desire to continually regard and protect a secret (otherwise it is not a secret). If timing of such a withdrawal attempt is an issue, as suggested by the 10th Circuit, then it should be resolved by facts and not by unsupported assumptions which favor the party who has the burden of proof. Therefore, any established FAA policy in that regard should be brought to light. We would like to see any updates on what has been entered in the

records and how those updates meet established policy for reclaiming secrets from the public domain. The regulations also require that a type certificate holder present the certificate to the FAA on demand (14 C.F.R. §49). It would seem that anyone wishing to protect the associated plans and specifications would make sure, as a very minimum, that it was able to do that. As part of the requested discovery, we are asking the FAA to make that demand and to tell us the result as part of its burden of proof justifying its reclassification of the material as "secret."

The FAA cannot claim any harm, prejudice or hardship in supplying answers to this discovery. On the other hand, denying this discovery, under the unusual events surrounding these particular documents, would result in prejudice to the plaintiff that would deny him a well thought out and just decision.

WHEREFORE the plaintiff requests an order compelling the defendant to provide answers to the interrogatories and request for production of documents within thirty days of the date of the order and for such other and further relief deemed just and proper by the Court.

__S_____
Michael J. Pangia, Esq. (D.C. Bar No. 967182)
LAW OFFICES OF MICHAEL J. PANGIA
1717 N Street, N.W.
Washington DC, 20036

Counsel for Plaintiff, Brent Taylor

Exhibits to Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Allow Discovery, United States District Court for the District of Columbia, No. 03-cv-173, filed January 20, 2004 (Docket Entry 15)

U.S. Department
of Transportation

Federal Aviation
Administration

July 07, 2003

Certified-Return Receipt

Mr. Brent Taylor
22001 Bluegrass Road
Ottumwa, IA 52501-8569

Dear Mr. Taylor,

Freedom of Information Act Request No. 2003-005011NE

This responds to your letter dated August 8, 2002, and assigned to this region on April 14, 2003 requesting under the terms of the Freedom of Information Act (FOIA), copies of documents relating to the Type Certification of Fairchild Model F-45 aircraft. In a June 2, 2003 telephone conversation with the Engine and propeller Directorate FOIA Coordinator, Deborah Fountain, you revised the scope of your FOIA request to be limited only to all Fairchild model F-45 technical drawings in our possession.

The Engine and Propeller Directorate in Burlington, MA and the New York Aircraft Certification Office in Valley Stream, NY conducted a complete records search for the requested items and located three boxes of F-45 technical drawings. In accordance with the fee schedule of Part 7, Title 49, of the Department of Transportation

Regulations, the fee to locate the requested documents is $18.50. Your check, draft or postal money order should be made payable to the DOT/FAA and forwarded within 30 days of receipt of this letter to the Federal Aviation Administration, Technical and Administrative Support Staff, ANE-103, 12 New England Executive Park, Burlington, MA 01803-5299.

On June 2, 2003, we notified you by certified mail of the FAA policy to provide organizations that submit records that may contain confidential commercial or financial information, the opportunity to object to disclosure of that information under the FOIA. In keeping with this policy, on June 2, 2003, we sent an index of the responsive technical drawings to The Fairchild Corporation, 45025 Aviation Drive, Suite 400, Dulles, VA 20166, for review and comments.

Fairchild strenuously objects to the release of any and all certification material. The technical drawings were submitted to the FAA by Fairchild to comply with regulatory requirements and to substantiate the type certification of the F-45 aircraft. Fairchild considers the records to be trade secrets and commercially valuable because such materials can be sold, transferred, assigned or licensed. Further, Fairchild states that the drawings are the result of costly and complex research and development which could have application, either directly or indirectly or with modification to other airframes, aircraft types, subassemblies, parts and industrial applications.

The FAA is persuaded that the drawings are exempt from disclosure under 5 U.S.C. Section 552(b)(4) as they concern "trade secrets and commercial or financial information obtained from a person that are privileged or confidential." National Parks & Conservation Assn. v.

Morton, 498 F.2d 765 (D.C. Circuit 1974)."

Exemption 4 of the FOIA is intended to protect the interests of the submitter in proprietary information submitted to the government. The requested documents contain the technical designs of the submitter's own products and are trade secrets. Disclosure of this material would allow the submitter's competitors to gain the unfair advantage of having access to that technical data without the costs of development. In addition, the documents were submitted under circumstances traditionally regarded in the aviation community as raising a promise of confidentiality. Disclosure of this proprietary data, submitted in confidence to the FAA, may well cause the submitter, and other similarly situated companies in the aviation industry, to reduce the amount of proprietary data provided to the FAA. The cooperative relationship between the submitter and the FAA, and between other companies and the FAA, would be substantially impaired. In that event, the FAA would find the accomplishment of its statutory function to promote safety in air commerce substantially more difficult. Therefore, the requested documents are exempt from mandatory disclosure under Exemption 4 of the FOIA.

Mr. Vito Pulera, Manager, New York Aircraft Certification Office, Mr. Jay J. Pardee, Manager, Engine and Propeller Directorate, and Ms. Meaghan Le Clere, Attorney, Regional Counsel's Office, assisted me in making the determination that these documents are exempt from mandatory disclosure under FOIA. You may request reconsideration of this determination by writing to the Assistant Administrator for Regions and Center Operations, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591. Your request must be made in writing within 30 days

from the receipt of this letter and must include all information and arguments relied upon. Your letter must state that it is an appeal from the above-described partial denial of a request made under the FOIA. The envelope containing the appeal should be marked "FOIA."

Sincerely,

/s/_____
Amy L. Corbert
Regional Administrator

LAW OFFICES
of
MICHAEL J. PANGIA, P.C.
1717 N STREET, NW
WASHINGTON, D.C. 20036-2801

(202) 955-6450
(202) 955-9444 (Facsimile)
Mike.law@verizon.net

Michael J. Pangia
Admitted D.C. & NY
NBTA Certified Trial
Specialist

Of counsel:
Law Offices of
William J. Apuzzo
685 Third Avenue
New York, NY 10017

Anderson, Korzen & Assoc.
233 West Mountain St.
Kernersville, NC 27284

July 17, 2003

Assistant Administrator for Regions and Center Operations
Federal Aviation Administration
800 Independence Avenue, SW,
Washington, DC 20591

RE: Freedom of Information Act Request No. 2003-005011A

Dear Sir/Madam:

I am representing FOIA requestor, Brent Taylor, who is hereby appealing the denial of his FOIA request, copy attached. It was sent to the Federal Aviation

Administration on August 22, 2002. This is an appealable denial for which we are requesting a reversal.

As a matter of background, this same information has been denied to another requestor, Greg Herrick, who appealed to the District Court for the District of Wyoming, then on losing, he appealed to the Court of Appeals for the Tenth Circuit. According to the decision (copy attached), the Court of Appeals held that this information is no longer a secret based upon a 1955 release by the owner (copy also attached). (See pages 16, and 17 of the decision).

Therefore, it has been adjudicated that these documents:

> .....are no longer "secret" for the purposes of Exemption 4. In such a situation, FOIA creates an obligation for the government to release the documents. When Fairchild granted permission to the CAA to loan the documents to individuals who requested them, for purposes of FOIA the documents ceased to be "secret."

The only reason why the Court of Appeals did not reverse the lower court is because of what the Court felt was still an open question; that is: can information in the public domain for nearly a half a century be made into a secret again, and if that is possible, whether it has in fact been remade into a secret in this instance. (see fn10 of the decision)

We respectfully submit to you that the government has the burden of proof on this issue. 5 U.S.C. 552 (a)(4), *see also* Lee v. FDIC, 923 F. Supp. 451 (S.D. N.Y. 1996). Therefore, in reviewing the matter please consider:

(1) That the information has not been treated by the submitter or successor as trade secret material.

(2) The present claimed owner, The Fairchild Corporation, has never even taken the basic steps of transferring the type certificate to its name. Transfer of a type certificate is a regulated event requiring proof of transfer from one owner to another. Upon satisfaction of that requirement, the FAA can then make the record transfer in the type certificate file. At least since the last time checked, that regulatory step was not accomplished. It is further evidence of not taking even the very basic steps of showing intention of maintaining a secret.

(3) The present claimed owner, The Fairchild Corporation, has never issued service bulletins, manuals and made drawings available to show continued airworthiness and FAR compliance for aircraft manufactured under that type certificate. They have never supported that type certificate for this aircraft as they would be required to do.

(4) At least as of the last time checked, the 1955 release of information had not been modified or rescinded by anyone, even after notice. This is further evidence of intent not to consider the materials as actively protected secrets.

Therefore, we submit that the FAA cannot meet its required burden of proof under the law and must reverse this decision to withhold this public information and release it under this request.

Sincerely,

/s/_____
Michael J. Pangia.

US Department
of Transportation

Federal Aviation
Administration

October 10, 2003

Michael J. Pangia, Esq.
1717 N Street, NW
Washington, DC 20036

Dear Mr. Pangia:

This is in response to your appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on behalf of your client Mr. Brent Taylor, from the denial of his request for a copy of the technical drawings for the Model F-45 that Fairchild Engine and Airplane Corporation (Fairchild) submitted to the Federal Aviation Administration's (FAA's) predecessor agency in order to obtain type certification for the aircraft. The denial was issued by the FAA's New England Region (Region) on the basis of exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). The Region found that the drawings qualified as "trade secrets and commercial or financial information obtained from a person that are privileged or confidential." Note that Mr. Taylor's initial request for all type certification information pertaining to the Fairchild Model F-45 was narrowed to include only the technical drawings pursuant to his request on June 2, 2003.

I have reviewed the denial in light of your appeal letter, and I conclude that the Region properly withheld the material pursuant to exemption 4 of the FOIA because the information qualifies as a trade secret and

confidential commercial information. 5 U.S.C. § 552(b)(4). Accordingly, your appeal is denied.

Be advised that pursuant to Executive Order 12600, and 49 C.F.R. § 7.17, the Region notified the Fairchild Corporation, Fairchild's successor-in-interest, of the request and provided it with an opportunity to submit written objections to release of the information. In its response, the Fairchild Corporation asserted that the technical drawings should continue to be withheld pursuant to the FOIA. The Region also made an independent determination that the information should be protected pursuant to exemption 4 of the FOIA.

On appeal, you acknowledge that this same information was denied to another FOIA requester as a trade secret, by the 10th Circuit, in Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002), *reh'g en banc denied* (September 23, 2002). You assert that the Herrick Court held that type certification materials pertaining to the Fairchild F-45 are "no longer a secret based upon a 1955 release by the owner." You also assert that the "only reason" why the Court of Appeals for the 10th Circuit did not reverse the holding of the District Court was because of an "open question" regarding the issue of whether information that is "in the public domain for nearly half a century be made into a secret again, and if that is possible, whether it has in fact been remade into a secret in this instance." You also assert that the submitter has not treated the material as a trade secret because it has not "taken the basic steps of transferring the type certificate to its name," or supported the type certificate by issuing bulletins, manuals, or making drawings available to show continued airworthiness and regulatory compliance for aircraft manufactured under the type certificate.

Under exemption 4 of the FOIA, information is protected if it is either trade secrets or "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). A trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). In Pacific Sky Supply, Inc. v. Dep't of the Air Force, No. 8602044, slip op. at 1-2 (D.D.C. Nov. 20, 1987), the court found that the design drawings of airplane fuel pumps developed by a private company and used by the Air Force were protected as trade secrets under exemption 4. By analogy, the technical drawings requested in this case are similarly protected as trade secrets. Moreover, the Court in Herrick found these drawings to constitute trade secrets subject to withholding under exemption 4.

You assert that FAA cannot meet its burden of showing that the information qualifies for withholding under exemption 4. You argue that the holding in Herrick requires that FAA release the technical drawings of the Model F-45 because they are no longer "secret," i.e. they are in the public domain. The withheld documents qualify as trade secrets under exemption 4. It is certainly true that in a FOIA case, the agency has the burden of justifying nondisclosure. 5 U.S.C. § 552(a)(4)(B). An agency can sustain its burden in litigation by submitting detailed declarations that identify the documents at issue and explain why they fall under the claimed exemption. Summers v. Dep't of Defense, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Unsupported claims that an agency is withholding information that is

in the public domain will not defeat the agency's motion for summary judgment. See Steinberg v. United States Dep't of Justice, 179 F.R.D. 357, 260 (D.D.C. April 28, 1998). Contrary to your assertion, the requester has the burden of demonstrating that the "exact information sought is already in the public domain." Students Against Genocide, et al v. Dep't of State, 50 F. Supp. 2d 20, 24 (D.D.C. 1999). (Court held that the agency did not waive its right to assert exemption 1 of the FOIA because the requester did not show that the specific information in question was in the public domain); see also Lundon Larouche, JR. v. Dep't of the Treasury, No. 91-1655, 2000 U.S. dist. LEXIS 5078, at *24 (D.C. Cir. March 31, 2000). (Court held that "mere" allegation that information was in the public domain without demonstrating that the information "matches" what is withheld does not waive the agency's right to assert exemption 3 protection). The Court of Appeals for the District of Columbia Circuit has observed that "It is far more efficient, and obviously fairer to place the burden of production on the party who claims that the information is publicly available." Occidental Petroleum Corp. V. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989). To require otherwise would be burdensome, as the government would theoretically have to identify all public sources not reproducing the information. Niagra Mohawk Power, Corp. v. United States Dep't of Energy, 975 F.2d 871, 877 (D.C. Cir. 1992).

Your unsupported assertion that the technical drawings are not secret, and in the public domain simply because Fairchild provided the Civil Aeronautics Authority (CAA) (FAA's predecessor) with limited authority in 1955 to release the information upon request is not a sufficient basis upon which to warrant release of the information. There is nothing in the FAA's records

indicating that the Fairchild Model F-45's technical drawings were ever released pursuant to the limited authority provided in the 1955 letter or by other authority. In its letter to the FAA, Fairchild Corporation states that none of the information at issue has "ever been released to a member of the public pursuant to the 1955 policy or pursuant to any other company policy or practice." Finally, and most important for proper analysis under exemption 4, you fail to produce any information showing that the technical drawings are in the public domain. Even if a request for the information at issue in this case had been received during the period when the agency had limited authority to release Fairchild's information, the 1955 letter did not provide CAA with blanket authority to release information pertaining to the Fairchild Model F-45. The authority to release was limited. FAA had authority to "loan" this information only "for use in making repairs or replacement parts for aircraft produced by Fairchild," and only to the extent that the information would not be used by the requester "to manufacture, sell, or offer for sale...parts built in accordance with these drawings." The limited authority provided to FAA, which predates enactment of the FOIA, was formally rescinded in 1998 following a request for all type certificate information pertaining to the Fairchild Model F-45. So, to the extent that FAA had authority to release Fairchild Model F-45 drawings that authority has since been withdrawn. Therefore, there is nothing to demonstrate that this information should be treated as anything other than a trade secret. Accordingly, I am withholding the information pursuant to exemption 4 of the FOIA.

Even if the information was once in the public domain, that fact alone is not sufficient to invalidate a subsequent determination to bring the material under the

protection of an exemption. Gilmore v. NSA, No. 92-3646, 1993 U.S. dist. LEXIS 22027 at *23 (N.D. Cal. May 3, 1993). (Court held that subsequent classification of information that was once in the public domain was not sufficient to invalidate subsequent classification of information).

You cite to Lee v. FDIC, 923 F.Supp. 451 (S.D.N.Y. 1996) to support your assertion that FAA has the burden to show that the technical drawings are not in the public domain. In Lee, the Court addressed the issue of whether withheld documents that were provided by Chase Manhattan Bank (Chase) to the Office of the Comptroller of the Currency (OCC) for use in the agency's consideration of whether to allow a merger between Chase and another financial institution qualified as confidential commercial information under exemption 4 of the FOIA. Lee at 453. It is important to note that the Lee case did not involve trade secrets. More importantly, the Lee court did not hold that OCC had the burden of proof on the issue of whether information that allegedly was in the public domain can subsequently qualify for trade secret status. In fact, there is nothing to suggest that any information at issue in the case was ever in the public domain. Regarding the issue of burden of proof, the court simply articulated the statutory requirement set forth at 5 U.S.C. § 552(a)(4)(B) that the agency has the burden of justifying nondisclosure. Id. So, the Lee case provides no support for the position that you take on appeal.

You also assert that the submitter has not treated the material as a trade secret, as it has not "taken the basic steps of transferring the type certificate to its name," or supported the type certificate by issuing bulletins, manuals, or making drawings available to show continued

airworthiness and regulatory compliance for aircraft manufactured under the type certificate. The issue of whether Fairchild has taken steps to transfer the type certificate in conformance with FAA regulations has nothing to do with whether the technical drawings are trade secrets and confidential commercial information. Transferring the type certificate does not demonstrate intent to maintain a secret; transferring the type certificate would only serve to demonstrate that Fairchild Corporation could manufacture the Fairchild Model F-45. Herrick at 1191.

I further find that the records qualify for withholding under the second prong of National Parks as well. Fairchild expended a significant amount of time and capital in developing the drawings. Disclosure of the technical drawings would likely cause substantial harm to Fairchild Corporation's competitive position because it could result in costly litigation concerning Fairchild's potential liability in the event of an accident involving a Model F-45 built in accordance with the drawings. In addition, disclosure could allow a competitor in the antique aircraft business to obtain the drawings and documentation for the minor copying fee that the agency charges pursuant to the FOIA. Air Line Pilots Assn., Int'l v. FAA, 552 F. Supp. 811 (D.C. Cir. 1982) (court held that release of technical drawings pertaining to aircraft's door assembly and thrust reverser mechanism, and flight test procedures and results could cause competitive harm to the submitter); United Technologies Corp. v. FAA, 102 F.3d 688, 692 (2d. Cir. 1996) (court held that "substantial harm" under FOIA exemption 4 would result from public disclosure of drawings and specifications concerning aircraft engine parts).

I am the person responsible for this decision. This is the final administrative action that will be taken on your appeal. If you are not satisfied with this decision, you may appeal it to the United States district court for the district in which you reside or have your principal place of business, the district in which the records are kept, or for the District of Columbia. This decision has been concurred in for the General Counsel of the Department of Transportation by Mr. Robert I. Ross, an attorney on his staff.

Sincerely,

/s/ Tracy Paquin for
Ruth Leverenz
Assistant Administrator for
Regions & Center Operations

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR, Plaintiff, v. MARION BLAKEY, *Administrator, Federal Aviation Administration*, Defendant, v. FAIRCHILD CORP., Intervenor Defendant	)	Case No. 1:03CV00173 (BMU) ECF

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF FAIRCHILD CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to LcvR 7(h), Intervenor-Defendant Fairchild Corporation ("Fairchild") submits the following Statement of Material Facts as to Which There Is No Genuine Issue in support of its Motion for Summary Judgment.

1. Plaintiff Brent Taylor ("Taylor") is a mechanic who restores vintage aircraft. Pl.'s Mot. to Allow Disc. at

7 [R.14].[1]

2. Greg Herrick ("Herrick"), a close associate of Taylor's, owns a F-45 aircraft manufactured by the Fairchild Engine and Airplane Corporation, a Maryland corporation, and its Fairchild Aircraft Division ("Fairchild Aircraft") in 1936. In November 1997, Herrick submitted a FOIA request to the Federal Aviation Administration ("FAA") to obtain plans and specifications regarding the F-45. Herrick v. Garvey, 298 F.3d 1184, 1188 (10th Cir. 2002). Herrick wanted these documents because he hoped they would aid him in restoring his F-45. Id.

3. The plans and specifications at issue were submitted by Fairchild Aircraft to the civil Aeronautics Agency ("CAA") - the FAA's predecessor - in 1935. Id. At the time, all airplane manufacturers were required to submit such documents in order to receive an Approved Type Certificate ("ATC"). Id. Without an ATC, no company located in the United States could construct, sell, or use an aircraft based on a new design. Id.

4. Once the CAA reviewed the documents related to the aircraft design, conducted (or required that the manufacturer conduct) tests, and determined that the aircraft was airworthy, the CAA granted the ATC, which gave Fairchild Aircraft the legal right to produce the F-45. Id. The CAA granted Fairchild Aircraft's ATC in 1936. Only sixteen F-45s were built. Id.

5. In November 1955, the Director of Engineering of Fairchild Aircraft wrote to the chief of the CAA and informed the CAA that it could loan data about the F-45

---

[1] Citations to pleadings or other materials filed with the Court are designated as [R.__].

from the CAA's files without directly contacting Fairchild. Herrick v. Garvey, 200 F. Supp. 2d 1321, 1329 (D. Wyo. 2000). During the 1955 to 1997 timeframe, the CAA, and later the FAA, released drawing lists of the F-45. Id. But the actual certification materials sought in this litigation never were released. Id.

6. The FAA replied to Herrick's request in December 1997, informing him that the requested materials were trade secrets, and thus exempt from FOIA pursuant to 5 U.S.C. § 552(b)(4). Herrick, 298 F.3d at 1188. The FAA instructed Herrick to contact the owner of the requested materials, Fairchild Industries, Inc., in order to obtain permission for the release of the information. Id. Herrick attempted to contact Fairchild Industries, but determined it had merged and then was sold to a new corporation, The Fairchild Corporation ("Fairchild"). Id.

7. Herrick appealed the FAA's determination in January 1998, arguing that Fairchild told him it had donated its antique aircraft memorabilia to the Smithsonian Institute in Washington, D.C. Id. at 1189. The FAA denied Herrick's appeal in October 1998, stating that it had contacted counsel for Fairchild and been informed that Fairchild objected to the release of the materials. Id. The FAA further notified Herrick that this denial constituted the final administrative decision of the agency, and that he had a right to challenge this ruling in federal court. Id.

8. Herrick subsequently filed suit in the U.S. District Court for the District of Wyoming, alleging that the FAA (1) improperly applied the "trade secret" exemption to the requested materials, and (2) had a legal duty under FOIA to release the materials. Id. Following discovery, the district court granted summary judgment to the FAA, holding that the "trade secret" exemption applied to the

materials. The district court also held that Fairchild was the successor-in-interest to Fairchild Aircraft and therefore also was the owner of the F-45 materials. Herrick, 200 F. Supp. 2d at 1327-28. Herrick appealed, and the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's decision in July 2002. Herrick, 298 F.3d at 1184.

9. In August 2002, Taylor, with the assistance of Herrick's counsel, Mr. Michael Pangia, wrote to the FAA requesting copies of the very same materials that the District of Wyoming and Tenth Circuit previously held were protected by FOIA's trade secret Exemption. Compl. ¶ 6, Exh. A [R.1].

10. The FAA has no record of Taylor's request from August 2002 and therefore did not respond to Taylor. Answer ¶9 [R. 11]; Joint Motion to Stay at 1 [R. 5]. Taylor appealed the FAA's non-response in November, 2002, but the FAA also has no record of the appeal. Id.

11. In February 2003, Taylor filed the instant lawsuit. Because the FAA did not have a record of the request that was mailed in August 2002, Taylor requested the F-45 materials again on April 7, 2003. Answer ¶9 [R. 11]; Joint Motion to Stay at 1[R. 5].

12. On April 18, 2003, the parties filed a Joint Motion to Stay so that the FAA could have time to process Taylor's FOIA request. Joint Motion to Stay at 1 [R. 5]. The FAA denied Taylor's FOIA request by letter dated July 7, 2003, which stated that the materials could not be released due to FOIA Exemption 4. Taylor appealed the FAA's decision on July 17, 2003, and on October 10, 2003, the FAA denied Taylor's appeal. Answer ¶ 9 [R. 11]

Respectfully submitted,

/s/

Emily M. Yinger, D.C. Bar #416714
Dirk C. Phillips, D.C. Bar #474290
HOGAN & HARTSON LLP
8330 Greensboro Drive, Suite 1100
McLean, VA 22102
(703)-610-6100
(703)-610-6200 (facsimile)

Attorneys for Intervenor-Defendant
The Fairchild Corporation

January 10, 2005

Exhibits and Attachments to Defendant's Motion for Summary Judgment, United States District Court for the District of Columbia, No. 03-cv-173, filed January 10, 2005 (Docket Entry 29)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Greg Herrick, an individual	)	
Plaintiff,	)	
v.	)	Case No. 99CV 234
JANE GARVEY, ADMINISTRATOR FEDERAL AVIATION ADMINISTRATION	)	
Defendant	)	

COMPLAINT

Plaintiff, Greg Herrick. ("Herrick"), for his complaint against Jane Garvey, Administrator. Federal Aviation Administration ("Collectively "FAA"), states as follows:

Nature of the Action

This is an action pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), as amended, demanding the FAA, to produce certain records within its possession and control.

The Parties

1. Herrick is an individual who resides in Jackson, Wyoming, and is a citizen of the United States of America.

2. The FAA is a Federal agency of the United States established by statute.

Jurisdiction

3. This Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 131 (Federal question), and 5 U.S.C. §552. the Freedom of Information Act ("FOIA").

Venue

4. Venue in this Court is proper pursuant to 5 U.S.C. § 552(a)(4)(B) which directs a complainant to file an action in the district in which the complainant resides, or has his principal place of business, or in which agency records are situated, or in the District of Columbia.

Count I: Violation of FOIA

5. Herrick is the owner of a Fairchild F-45 aircraft.

6. The FAA, is the custodian of copies of mechanical blueprint drawings which were submitted by the manufacturer of the Fairchild F-45 to the FAA in support of their application for an Approved Type Certificate prior to commercial production of the proposed aircraft.

7. FOIA provides that Federal agencies shall make certain enumerated records available for public inspection and copying.

8. Fairchild aircraft Model F-45-A1 commonly referred to as the "F-45," was awarded Approved Type Certificate, Number 603, on April 29, 1936 by the CAA, the predecessor to the FAA.

9. On November 14, 1997, Herrick sent a letter, pursuant to FOIA, the FAA requesting copies of the Fairchild F-45 Approved Type Certificate and related certification drawings, ("certification drawings"), in order to restore the aircraft, in conformity with its original type certificate. A copy of Herrick's FOIA request is attached hereto as Exhibit "A", and incorporated by reference

herein.

10. On December 12, 1997, the FAA denied Herrick's request. The FAA claims that the requested Fairchild F-45 certification drawings are exempt from public disclosure pursuant to 5 U.S.C. § 552(b)(4) because they concern trade secrets and commercial or financial information obtained from a person or privileged source. A copy of the FAA's denial is attached hereto as Exhibit "B", and incorporated by reference herein.

11. On January 28, 1998, Herrick, under FOIA, appealed the FAA' s denial of his request to obtain the Fairchild F-45 certification drawings. A copy of Herrick's appeal letter is attached hereto as Exhibit "C", and incorporated by reference herein.

12. On information and belief, the Fairchild F-45 aircraft was last manufactured in 1936 by the Fairchild Engine & Airplane Corporation.

13. On information and belief, the Fairchild Engine & Airplane Corporation was originally incorporated in Maryland in 1936.

14. On information and belief, the Fairchild Engine & Airplane Corporation of Maryland changed its corporate name to Fairchild Industries, Inc., on April 28. 1971, and on May 4, 1987 merged into a Delaware corporation as successor in interest with the same corporate name.

15. On information and belief Fairchild Industries, Inc., of Delaware merged with Banner Industries, Inc., on June 18, 1989.

16. On information and belief Fairchild Industries, Inc., of Delaware changed its corporate name to Fairchild Corporation on November 15, 1990.

17. After a diligent inquiry, Herrick has been unable to determine if any person or entity has any true proprietary interest in the Fairchild F-45 certification drawings.

18. Herrick, through counsel, has learned that Fairchild Corporation claims a propriety interest in the Fairchild F-45 certification drawings.

19. On October 26, 1998, the FAA made its final denial of Herrick's FOIA request. Once again, the FAA claims that the requested documents are exempt from disclosure under 5 U.S.C. § 552(b)(4). A copy of final denial is attached hereto as Exhibit "D", and incorporated by reference herein.

20. Herrick does not intend to use the requested Fairchild F-45 certification drawings for any unlawful purpose.

21. Herrick intends to use the requested Fairchild F-45 certification drawings to refurbish his Fairchild F-45 aircraft for his personal flying enjoyment, and not for the commercial production of the aircraft.

22. On April 3, 1996, Herrick sent a letter, pursuant to FOIA, to the FAA requesting copies of the certification drawings for the 1928 Fairchild FC-2W2. A copy of Herrick's FOIA request for the Fairchild FC-2W2 is attached hereto as Exhibit 'E", and incorporated by reference herein.

23. In 1996, the FAA released copies of certain certification drawings for the 1928 Fairchild FC-2W2 to Herrick.

24. The FAA has traditionally released Aircraft Type Certificates and related certification drawings for older aircraft which are no longer in commercial production to

interested restorers and aircraft owners.

25. The FAA has no legal basis for withholding the right of access to the Fairchild F-45 certification drawings.

26. The failure of the FAA to release the Fairchild F-45 certification drawings constitutes a violation of FOIA.

27. The Fairchild Corporation will not suffer any competitive harm by the release of the Fairchild F-45 certification drawings.

28. Herrick will suffer great expense, inconvenience and risk of harm to person and property if he is unable to obtain the requested Fairchild F-45 certification drawings.

29. Herrick has incurred personal expense in filing his FOIA request and appeal, and this action against the FAA, including attorneys fees.

30. Subsection (a)(4)(E) of FOIA permits the prevailing party to recover attorneys fees.

31. Herrick has exhausted all administrative remedies provided by the Freedom of Information Act and FAA agency regulations.

WHEREFORE, Plaintiff, Greg Herrick, requests this Court to:

1. Order the FAA to produce the requested Fairchild F-45 certification drawings;

2. Allow Herrick to recover his damages and attorney fees associated with the filing of this Complaint; and,

3. Grant such other and further relief as this Court may deem just and proper.

Dated: June 23, 1999

Respectfully submitted,

GREG HERRICK, Plaintiff

By: /s/_____

Joseph F. Moore, Jr.
MOORE & MYERS
P.O. Box 8498
Jackson Hole, Wyoming 83002
Phone (307) 733-8668
Facsimile: (307) 733-3220

and

John W. Harrington, Esq.
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
120 N. LaSalle Street
26th Floor
Chicago, Illinois 60606
Phone: (312) 704-0550
Facsimile: (312) 704-1522

Golden Wings Flying Museum
Greg Herrick
P.O. Box 6291
Jackson, Wyoming 83002-6291
Wyoming office: 307-739-8175
Wyoming fax: 307-733-3731
MN hanger: 800-550-4008

November 14, 1997

Ms. Mary J. Barrett
FAA-ACO
10 · 5th Street
Valley Stream, NY 11581
via fax: 516-568-2716

Re: Freedom of Information Act Request

Dear Ms. Barrett:

We wish to obtain copies of the certification drawings and any additional data and/or drawings on file for the following aircraft:

Manufacturer: Fairchild
Model: F-45

We are willing to pay the FAA any reasonable reproduction fees and/or to take full responsibility for the documents if they are loaned to us for reproduction by an outside reproduction facility.

Thank you for your kind attention to this request.

Greg Herrick

/s/_____
President

U.S. Department
of Transportation

Federal Aviation
Administration

Dec 12 1997

Mr. Greg Herrick
Yellowstone Aviation, Inc.
P.O. Box 6291
Jackson, Wyoming 83002-6291

Dear Mr. Herrick:

FOIA No. 1998-001664NE

This is in reference to your letter dated November 14, 1997 requesting under the terms of the Freedom of Information act (FOIA), certification drawings and data for Fairchild F-45 aircraft.

The information you requested for the Fairchild F-45 is exempt from disclosure under 5 U.S.C., Section 552(b)(4) as implemented by 49 C.F.R. 7.71(a) as it concerns "trade secrets and commercial or financial information obtained from a person or privileged source."

We have made an independent determination that the information falls within Exemption 4 of the Freedom of Information Act. The fourth exemption protects commercial or financial information submitted to the government in confidence, if disclosure would, as in this case, seriously undermine the viability of the aircraft type certification regulatory process.

We understand your desire to obtain this information to aid you in your aviation project. The last known

address is listed as Fairchild Industries, Inc., Hagerstown and Germantown, MD. If you can obtain the owner's permission for the FAA to release whatever drawings we have in our possession, and forward it to us in writing, we will make every endeavor to make them available for you to view and/or reproduce.

The undersigned, Mr. Chris Poreda, and Mr. Vito Pulera are responsible for this denial. You may request reconsideration of this determination by writing to the Associate Administrator for Administration, Federal Aviation Administration, 800 Independence Ave, S.W., Washington, D.C. 20591. The application must be made within 30 days from the date of the receipt of this letter and must include all information and arguments relied upon. Your letter must state that it is an appeal from the above-described denial of a request made under FOIA. The envelope containing the appeal should be marked "FOIA".

Sincerely,

/s/_____
Robert S. Bartanowicz
Regional Administrator, ANE-1

Enclosure

BLATT, HAMMESFAHR & EATON
333 W. WACKER DRIVE, SUITE 1900
CHICAGO, ILLINOIS 60606
TELEPHONE (312) 849-8000 FAX (312)357-0198
E-MAIL ADDRESS bhe@bhelaw.com
www.bhelaw.com

NEW YORK OFFICE
45 BROADWAY, 12TH FLOOR
NEW YORK, NEW YORK 10006
TELEPHONE (212) 363-1900
FACSIMILE (212) 363-2600

LONDON OFFICE
11-12 BURT STREET
THIRD FLOOR
LONDON EC3A 5AB
ENGLAND
TELEPHONE
0171-342-8000
FACSIMILE
0171-342-8020

January 28, 1998

Ms. Valerie Collins
FOIA Program Manager
Associate Administrator for Administration
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Re: FOIA No.: 1998-001664 NE
Appeal of FOIA Request Denial
Our File No.: 102144

Dear Ms. Collins,

We are writing to appeal your action on the above-referenced FOIA request on behalf of Mr. Greg Herrick. Mr. Herrick's original FOIA request dated November 14, 1997, requested copies of certification

drawings for the 1936 Fairchild, Model F-45 aircraft. A copy of which is enclosed as Exhibit A.

Through a letter dated December 12, 1997, Mr. Herrick's request for the F-45 drawings was denied. A copy of which is enclosed as Exhibit B. Mr. Bartanowicz, Regional Administrator, ANE-1, cited 5 U.S.C., Section 552(b)(4) concerning "trade secrets and commercial or financial information obtained from a person or privileged source" as his basis for the denial. This letter further stated Mr. Herrick would be allowed 30 days to appeal the denial and suggested that he contact Fairchild Industries directly for permission to release the drawings.

In the denial letter, Mr. Bartanowicz noted that the last known address for Fairchild was either Hagerstown or Germantown, Maryland. Upon receiving this information, Mr. Herrick contacted our firm to assist him in locating the owner of the Fairchild drawings.

We researched the Fairchild corporate name with the Maryland Department of Assessments and Taxation, and we uncovered the following corporate information. Fairchild Industries was incorporated in Maryland in 1936. On March 19, 1987, Fairchild merged into a Delaware corporation as successor in interest. The Maryland Fairchild corporation was dissolved in March, 1993. A copy of the Certificate of Dissolution from the Maryland Department of Assessments and Taxation as Exhibit C is enclosed for your review.

In April, 1996, the Delaware Fairchild Corporation was dissolved and split into nine separate subdivisions. These nine remaining divisions were purchased and/or merged with several companies along the east coast. We researched the existing subdivisions, and located a Virginia-based Fairchild Industries Corporation, in

Chantilly, Virginia.

The general counsel for Virginia-based Fairchild Corporation, Donald Miller, stated that the corporation donated all Fairchild aircraft memorabilia to the Smithsonian Institute, in Washington, D.C. Mr. Miller stated that Fairchild would be unwilling to provide a letter stating that the documents had been donated to the Smithsonian and advised us to contact the Smithsonian for copies of the certification drawings.

The Smithsonian National Air and Space Archives Division confirmed that they were in possession of numerous Fairchild documents and memorabilia. The Virginia-based Fairchild corporation had donated the documents by a deed of gift. Smithsonian representatives later stated that due to the large volume of documents, they wereunable to state unequivocally that they were in possession of Fairchild certification drawings for the 1936 F-45. A representative of the National Air and Space Division of the Smithsonian, Mr. Brian Nicholas, opined that if neither the Smithsonian nor Fairchild possessed the drawings, they were most likely destroyed and no longer in existence. Exhibit D contains a more complete illustration of the conversations which took place between this office and both Fairchild and the Smithsonian.

As stated above, Section 552(b)(4) protects disclosure of "trade secrets and commercial or financial information obtained from a person that is privileged and confidential." This exemption is restated in agency regulations as 49 C.F.R. 7.71(a). This cited exemption does not cover this type of material because the certification drawings as issue are no longer confidential and does not qualify as a trade secret. Therefore, the exemption claimed in this matter does not support

withholding of this information under the Freedom of Information Act.

Federal case law has defined "confidential" information as exempt from disclosure if: "(1) the disclosure is likely to cause substantial harm to the competitive position of the person from whom it was obtained; or (2) the disclosure is likely to impede the government's future efforts to obtain such information." National Parks & Conservation Ass'n v. Morton, 498 F.2d 1132 (D.C. Cir. 1987). The term "trade secret" is somewhat difficult to precisely define, but the 1938 Restatement of Torts Section 757, comment b, states "[a] trade secret may consist of any formula, pattern device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it....A trade secret is a process or device for continuous use the operation of the business."

Mr. Herrick's request for the Fairchild certification drawings does not cause any substantial harm to the competitive position of Fairchild. Moreover, the general counsel for the Virginia-based Fairchild Industries stated that the corporation is no longer in the business of designing, manufacturing, or building any type of aircraft. Therefore, Fairchild is in no position to argue that the release of these drawings would produce competition against Fairchild. Additionally, Fairchild's decision to voluntarily release the Fairchild historical documents and memorabilia to the Smithsonian Institute represents a clear waiver of any claim to confidentiality otherwise maintained by Fairchild. Finally, the disclosure of the drawings will not impede the government's future efforts to obtain this information because the drawings are already archived with the Federal Aviation

Administration.

Because the Freedom of Information Act exemptions do not cover the requested material, we request that the agency review the records and allow the documents to be disclosed to Mr. Herrick. Pursuant to the FAA's request, we have diligently accessed all available options in obtaining the owner's permission, without success. Additionally, Fairchild's donation of historical documents to the Smithsonian, a public museum, bars arguments that the drawings remain trade secrets. Pursuant to the Act's requirements on administrative appeals, we request a response to this appeal within twenty workings days of receipt of this letter.

We hope that our efforts have convinced you to reverse your denial of Mr. Herrick's FOIA request for 1936 Fairchild F-45 certification drawings. If you should require additional information, please do not hesitate to contact me or Kimberly S. Cromer. We look forward to your response.

Very truly yours,

BLATT, HAMMESFAHR & EATON

/s/_____
John W. Harrington

JWH/bjw
Enclosures

U.S. Department
of Transportation

Federal Aviation
Administration

October 26, 1998

John W. Harrington, Esq.
Blatt, Hammesfahr & Eaton
333 W. Wacker Drive
Suite 1900
Chicago, IL 60606

Dear Mr. Harrington:

This is in response to your appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on behalf of your client Mr. Greg Herrick, from the denial of his request for a copy of the certification drawings for the 1936 Fairchild, Model F-45 aircraft. The denial was issued by the Federal Aviation Administration (FAA) New England Region (Region) on the basis of exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). The Region found that the drawing qualified as "trade secrets and commercial or financial information obtained from a person or privileged source."

In your appeal, you state that you contacted the general counsel of now existing Fairchild Corporation who told you that the corporation had donated all Fairchild aircraft archive memorabilia to the Smithsonian Institution. Additionally, you state that the general counsel verified that Fairchild Corporation is no longer in the business of designing, manufacturing, or building any type of aircraft. You also say that you contacted the

Smithsonian National Air and Space Archives Division who confirmed that they were in possession of the Fairchild information. However, due to the volume of information they could not confirm if they were in possession of the certificate drawings for the 1936 F-45. Based on this donation, you allege that the Fairchild drawings are no longer covered under exemption 4 because they are no longer confidential and do not qualify as a trade secret.

Please be advised that we contacted the Smithsonian Archives Division and were advised that although, they have voluminous information donated by the Fairchild Corporation they are not in possession of any type certificate packages for any of the Fairchild aircraft. They stated that the subject information is in the possession of the FAA. Additionally, we contacted the general counsel of the Fairchild Corporation who informed us that he still objects to the release of any type certificate information on the Fairchild aircraft. Therefore, I find that Fairchild Corporation has not waived any protection provided under exemption 4 of the FOIA.

Under exemption 4 of the FOIA, information is protected if it is either trade secrets or "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). A trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir 1983). In Pacific Sky Supply, Inc. v. Dep't of the Air Force, No. 8602044, slip op. at 1-2 (D.D.C. Nov.

20, 1987), the court found that design drawings of airplane fuel pumps developed by a private company and used by the Air Force were protected as trade secrets under exemption 4. By analogy, the requested information is also protected as a trade secret and not subject to disclosure pursuant to exemption 4.

I am the person responsible for this decision. This is the final administrative action that will be taken on your appeal. If you are not satisfied with this decision, you may appeal it to the United States district court for the district in which you reside or have your principal place of business, the district in which the records are kept, or for the District of Columbia. This decision has been concurred in for the General Counsel of the Department of Transportation by Mr. Robert I. Ross, an attorney on her staff.

Sincerely,

/s/ Valerie G. Collins for
Ruth Leverenz
Assistant Administrator for
Region & Center Operations

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

GREG HERRICK	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-CV-234J
	)	
JANE GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION	)	
	)	
Defendant	)	
	)	

DECLARATION OF VITO A. PULERA

I, Vito A. Pulera, being of lawful age, do state and declare as follows:

1. I have personal knowledge of the facts set forth below.

2. I am the Manager, New York Aircraft Certification Office (NY ACO), Federal Aviation Administration (FAA), 10 Fifth Street, Valley Stream, New York, 11581.

3. I have worked at the NY ACO since 1982, first as an aerospace engineer and now serving as the manager of the office since August 1995.

4. I am very familiar with the procedural and practical aspects of type certification of aircraft by the FAA.

5. The NY ACO currently serves as the custodian for

certification files, including engineering drawings, specifications, blueprints and other related documentation (collectively, the "Certification Materials") for aircraft designed by the Fairchild Corporation, and its predecessors.

6. The Fairchild Model F-45 aircraft is one aircraft for which the NY ACO serves as custodian of certification materials.

7. The certification materials for the Fairchild Model F-45 aircraft design were submitted to the FAA's predecessor agency for the purpose of obtaining government approval under the certification standards contained in regulations promulgated by the federal government.

8. The FAA customarily treats certification materials as proprietary information. It considers certification materials to be trade secrets, as they typically contain plans, drawings, process specifications, or other information describing a device to be manufactured for commercial profit, and the applicants typically do not disclose the information to the public.

9. My office receives numerous requests under the Freedom of Information Act for certification materials. The FAA denies these requests pursuant to exemption 4 of the FOIA unless the submitter of the certification materials consents to the release of the information.

10. My office received a FOIA request from Greg Herrick for the certification materials for the Fairchild F-45. The FAA located several boxes of certification materials for the Fairchild F-45.

11. Attached to this declaration are indices that list the F-45 "certification drawings and any additional data

and/or drawings" in the custody and control of the FAA. I reviewed these materials. They consist of the technical blueprints depicting the design, materials, components, dimensions and geometry of the aircraft, engineering, analyses, and engineering test reports. All of these materials represent plans, formulae, processes and procedures which were used for the development, quality assurance, and manufacture of the Fairchild F-45 aircraft, and all of the materials clearly represent the end product of both innovation and substantial effort. They are directly related to the process of producing the aircraft.

12. The Fairchild F-45 certification materials were commercially valuable when they were submitted to the government, and they are commercially valuable today. At the time they were submitted, the materials were essential to the production of the aircraft. Without them, a type certificate could not have been obtained for the aircraft design and the government would not have permitted the F-45 to be commercially produced.

13. Today, the F-45 certification materials have commercial value in the antique airplane market. For example, if a person restored an F-45, and wanted to fly the aircraft, each repair to the aircraft must be certified as an airworthy repair. This procedure is significantly easier if the certification materials are available, as an airplane mechanic with an FAA inspection authorization (IA) can rely upon the certification materials to certify that the airplane is airworthy, and return the airplane to service after repair. Without the materials the mechanic would have to establish some other means of demonstrating, to the FAA, the airworthiness of each repair made to restore the aircraft. This approach is more costly, time-consuming and uncertain than simply

using the certification materials. Moreover, if a significant number of repairs were made, the cumulative effect of the multiple repairs would have to be considered by the FAA and the aircraft might not be approved as airworthy. An antique aircraft which can be flown is more valuable than the same airplane which cannot.

14. As another example, certification materials for antique aircraft are also valuable in the production of replicas for flight. Without the certification materials, the operator of the replica would have to perform or obtain the engineering analysis necessary to obtain a certificate to fly the aircraft. If the certification materials are available, this engineering would not have to be redone, and experimental airworthiness certificates could be obtained by the operators of the aircraft based upon the engineering in the already-existing certification materials.

15. I have reviewed the affidavit of Donald E. Miller, Executive Vice President, General Counsel and Corporate Secretary of the Fairchild Corporation. Although I do not completely agree with his characterization of the certification materials, I concur with his position that the certification materials contain trade secrets and are commercially valuable.

16. In a letter dated December 12, 1997, the Regional Administrator, in consultation with me, denied Mr. Herrick's FOIA request for the F-45 certification materials, pursuant to Exemption 4 of the FOIA. The letter advised Mr. Herrick that if he could obtain the permission of the owner of the materials for the FAA to release them, and forwarded the release in writing, we would make the documents available. The Fairchild Corporation has declined to give Mr. Herrick permission to obtain the materials, and Fairchild has advised the

FAA that it objects to the release of the materials.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed this 13th day of July, 2000, in Burlington, Massachusetts.

/s/_____
Vito A. Pulera
Manager, New York Aircraft Certification Office

County of Middlesex)
Commonwealth of Massachusetts) ss.

On this 13th day of July, 2000, before me personally appeared Vito A. Pulera, to me known to be the person described in and who executed the foregoin instrument, and acknowledged that he executed the same as his free act and deed.

/s/_____
CHRISTOPHER POREDA
Notary Public
My Commission Expires
April 5, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENT TAYLOR,	:	
Plaintiff,	:	Civil Action No.:
	:	03-0173 (RMU)
v.	:	
	:	Document No.: 42
MARION BLAKEY,	:	
Administrator, Federal	:	
Aviation Administration *et al.*,	:	
Defendants.	:	

MEMORANDUM OPINION

DENYING THE PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT AND RENDERING SANCTIONS INAPPROPRIATE

I. INTRODUCTION

The plaintiff, Brent Taylor, brought suit against the Federal Aviation Administration ("FAA") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking design specifications for the Fairchild F-45 ("the F-45"), an antique aircraft. Thereafter, the defendants filed a motion for summary judgment, wherein the defendants argued that res judicata bars this case because Greg Herrick litigated and lost an identical FOIA request in *Greg Herrick v. Jane Harvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002). Because Herrick and Taylor share, among other things, identical interests and a close relationship, Herrick was Taylor's "virtual representative" in *Herrick v. Harvey* so as to preclude the instant case. Accordingly, on May 12, 2005, the court granted summary judgment to the defendants. Because this case directly violated res

judicata principles, the court ordered the plaintiff to show cause why he and his lawyer should not be required to pay the attorney's fees that the defendants incurred in this litigation.

This matter comes before the court on plaintiff Taylor's "memorandum in support of the showing why the plaintiff believes the court's decision is wrong and why sanctions are inappropriate" ("Mot."). By way of minute order, on May 31, 2005, the court construed the plaintiff's filing as a motion for reconsideration of its grant of summary judgment to the defendants. Because the plaintiff has failed to demonstrate any of the six factors justifying relief from judgment, the court denies the plaintiff's motion for relief from judgment.

II. BACKGROUND[1]

The plaintiff is a mechanic who restores vintage aircraft. Def.-Intervenor Fairchild's Statement of Material Facts ("Fairchild's Statement") ¶ 1. He is also the president of the Antique Airplane Association, which is dedicated to the preservation of vintage aircraft and aviation heritage. Compl. ¶ 2. In August 2002, the plaintiff wrote to the FAA requesting information (including plans, blueprints, specifications, engineering drawings and other data) concerning a 1935 F-45 aircraft manufactured by the Fairchild Engine and Airplane

---

[1]As the court stated in its May 12, 2005 memorandum opinion, because the plaintiff did not submit a statement of disputed material facts in his opposition to the defendants' motions, "the court may assume the facts identified by the moving party in its statement of material facts are admitted." Mem. Op. (May 12, 2005) at 2 n.1 (citing LCvR 7(h)). Accordingly, the court will cite to Fairchild's statement of material facts.

Corporation ("FEAC"), Fairchild's predecessor entity.[2] Fairchild's Statement ¶ 9. FEAC produced about twelve F-45 aircraft, of which only two survive. Pl.'s Mot. for Disc. at 1, 4. In November 2002, after receiving no response to his August letter, the plaintiff appealed the government's non-response. Fairchild's Statement ¶ 10. On February 2003, still without the information he sought, the plaintiff filed the instant complaint.[3]

In 1997, well before the inception of this case, Greg Herrick – an owner of the F-45 and a "close associate" of the plaintiff – submitted a FOIA request to the FAA for the same information that the plaintiff now seeks. *Id.* ¶¶ 2-4, 9. The FAA denied Herrick's request on the basis that the information was a trade secret and thus exempt from FOIA disclosure. *Id.* ¶ 6. Herrick brought suit in U.S. District Court for the District of Wyoming to challenge the FAA's invocation of the trade-secret exemption. *Id.* ¶ 8; *see also Herrick*, 200 F. Supp. 2d at 1322-23 (noting that Herrick "seeks to compel the agency to disclose certain technical drawings and other data provided to the agency by the Fairchild Aircraft Corporation in 1935 in connection with its 'Application for Approved Type Certificate' for an aircraft known as the Fairchild F-45").

In the lower court proceedings of *Herrick v. Harvey*,

---

[2]The Federal Aviation Administration ("FAA") possesses this information because federal safety regulations required the Fairchild Engine and Airplane Corporation ("FEAC") to submit certain design specifications and technical drawings for the F-45 to the Civil Aeronautics Agency, the predecessor of the FAA. Def.-Intervenor Fairchild's Statement of Material Facts ("Fairchild's Statement") ¶ 3.

[3]Fairchild Corporation moved to intervene as a defendant in this case, and the court granted its motion on November 15, 2004. *Id.*

Herrick represented that he was "interested in the preservation of antique aircraft" and possessed a "1936 F-45 originally built by Fairchild Engine and Airplane Corporation." *Herrick*, 200 F. Supp. 2d at 1322-23. The district court granted summary judgment to the FAA, upholding the FAA's application of the tradesecret exemption. *Id.* at 1329. Herrick appealed, arguing that (1) the documents no longer constituted a trade secret because the FAA had not shown that Fairchild owned the documents, (2) the documents lost secret status when Fairchild granted the FAA permission to release the documents to the public in 1955, and (3) Fairchild's new refusal to release the documents did not restore the exempt status of the documents because, again, Fairchild did not own the documents. *Herrick v. Harvey*, 298 F.3d 1184, 1190 (10th Cir. 2002).

The Tenth Circuit affirmed the lower court, holding that Fairchild did, in fact, own the documents. *Id.* at 1191. Furthermore, the court held that the documents lost secret status when Fairchild granted the FAA permission to release the documents to the public in 1955. *Id.* Significantly, however, the court noted that Herrick "has not challenged the legal conclusion that it might be possible for [Fairchild] to revoke the permission to loan the documents to the public or that such a revocation would restore the secret nature of the documents." *Id.* at 1194 n.10. Thus, the court "decline[d] to overturn the district court's judgment on a point that the plaintiff has failed to challenge on appeal." *Id.*

On May 12, 2005, this court granted the defendant and the defendant-intervenor's motions for summary judgment, concluding principally that because the plaintiff's and Herrick's lawsuits are identical, and

because the plaintiff and Herrick are in legal privity, the doctrine of res judicata bars the plaintiff's complaint. Mem. Op. (May 12, 2005) at 7-13. Specifically, the court stated that:

> the court is left with two individuals who are quite fond of antique aircrafts and the historical preservation thereof, who are members of the same antique aircraft association, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and Taylor has agreed to repair. These facts, coupled with the plaintiff's total failure to present a scintilla of evidence in his favor, firmly establish an identity of interests, a close relationship between the parties, and Taylor's apparent acquiescence in Herrick's litigation. Furthermore, the parties essentially identical interests—not to mention their use of the same lawyer—establishes adequacy of representation[.]

The plaintiff filed a memorandum, which the court construed as a motion for reconsideration. Minute Order (May 31, 2005). The plaintiff's motion, in substance, is two pronged. First, the plaintiff seeks relief from this court's order granting the defendants' motions for summary judgement. Second, the plaintiff responds to the court's show cause order directing the plaintiff to show cause why he and his counsel should not pay the defendants' and defendant-intervenor's costs. The court addresses these issues in turn.

III. ANALYSIS

A. Relief Under Federal Rule of Civil Procedure 60(b)[4]

In its discretion, the court may relieve a party from an otherwise final judgment pursuant to any one of six reasons set forth in Rule 60(b). FED. R. CIV. P. 60(b); *Lepkowski v. Dep't of Treasury*, 804 F.2d 1310, 1311-12 (D.C. Cir. 1986). First, the court may grant relief from a judgment involving "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b). Such relief under Rule 60(b) turns on equitable factors, notably whether any neglect was excusable. *Pioneer Inv. Servs. Co. v. Brunswick Ass'n Ltd. P'ship*, 507 U.S. 380, 392 (1993). Second, the court may grant relief where there is "newly discovered evidence" that the moving party could not have discovered through its exercise of due diligence. FED. R. CIV. P. 60(b). Third, the court may set aside a final judgment for fraud, misrepresentation, or other misconduct by an adverse party. *Id.*; *Mayfair Extension, Inc. v. Magee*, 241 F.2d 453, 454 (D.C. Cir. 1957). Specifically, the movant must show that "such 'fraud' prevented him from fully and fairly presenting his case," and that "the fraud is attributable to the party or, at least, to counsel." *Richardson v. Nat'l R.R. Passenger Corp.*, 150 F.R.D. 1, 7 (D.D.C. 1993) (Sporkin, J.) (citations omitted). Fourth, the court may grant relief where the judgment is "void." FED. R. CIV. P. 60(b). A

---

[4]Defendant FAA has filed a response to the plaintiff's motion for relief from judgment urging the court to apply the legal standard applicable for motions brought pursuant to Federal Rule 59(e). Because the plaintiff's motion was filed greater than 10 days following the court's memorandum opinion, this court applies Federal Rule 60(b), rather than Federal Rule 59(e) as the defendant incorrectly urges.

judgment may be void if the court lacked personal or subject-matter jurisdiction in the case, acted in a manner inconsistent with due process, or proceeded beyond the powers granted to it by law. *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 871 (4th Cir. 1999). Fifth, the court may grant relief if the "judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed . . . or it is no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60(b); *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988) (noting that not all judgments having continuing consequences are "prospective" for the purposes of Rule 60(b)). Sixth, the court may grant relief from a judgment for "any . . . reason justifying [such] relief." FED. R. CIV. P. 60(b). Using this final catch-all reason sparingly, courts apply it only in "extraordinary circumstances." *Pioneer Inv. Servs.*, 507 U.S. at 393.

A party proceeding under one of the first three reasons must file his Rule 60(b) motion within one year after the judgment at issue. FED. R. CIV. P. 60(b). A party relying on one of the remaining three reasons may file his Rule 60(b) motion within a reasonable time. *Id.* The party seeking relief from a judgment bears the burden of demonstrating that he satisfies the prerequisites for such relief. *McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002).

B. The Court Denies the Plaintiff's Motion for Relief from Judgment

In support of his motion for relief from judgment, the plaintiff characterizes the court's ruling to mean "in essence, that information, although potentially not falling within Exemption 4, is nevertheless unavailable to

certain members of the public who may happen to know Mr. Herrick or his counsel." Mot. at 3. The court's memorandum opinion was incorrect, the plaintiff argues, because the opinion "placed the material sought into some undefined protected status for certain members of the public by applying *res judicata* to waiver of an issue which the Herrick Court stated was undecided and based merely on assumption for the purpose of that case alone." *Id.* at 5. The court's role in addressing a motion for relief from judgment is not to clarify its original determination. Nonetheless, the plaintiff has mis-characterized the court's May 12, 2005 memorandum opinion.

For the reasons more fully set forth in the court's May 12, 2005 memorandum opinion, the court dismissed the plaintiff's complaint because a sister district court in Wyoming had previously ruled on the identical issues presented here, and because the plaintiff was in legal privity with the losing litigant in the case in Wyoming. *See* Mem. Op. (May 12, 2005). The doctrines of res judicata and claim preclusion bar repetitious litigation involving the same action or the same issues, *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983), and brought by a "party or their privies," *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002). The plaintiff does not argue that this court erred, save to repeat the same arguments previously argued, and rejected, by this court. The plaintiff, for example, argues that "[t]he defendants in raising and insisting on application of *res judicata* to that case have urged this Court to turn a blind eye to the *Herrick* court's actual finding, and instead focus the Court's attention only on the un-raised and undecided waiver argument which the 10th Circuit explicitly stated was based on assumption for the purpose of that case alone." Mot. at 6. This court previously rejected this

argument, however, when it stated that

> the plaintiff's main substantive challenge to the defendants' motion is to cite as a disputed material fact the unresolved *legal* issue that his own lawyer failed to raise on appeal in Herrick's case. That meritless argument has no bearing on res judicata; rather, it simply strengthens the court's belief that the plaintiff seeks to accomplish precisely what the doctrine forbids.

Mem. Op. (May 12, 2005) at 13 (emphasis in original). What's more, for the court to adopt the plaintiff's rationale, it would be rejecting the doctrine of res judicata on the grounds that the Tenth Circuit declined to upset the district court's determination due to the plaintiff's failure to raise the issue on appeal. Herrick's failure to raise an issue on appeal cannot be the caisson for his privy to carry an already dead legal issue to this court. The doctrine of res judicata, as this court explained in its December 12, 2005 memorandum opinion, precludes such an eventuality. *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (stating that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action").

The plaintiff is not entitled to a revision of the court's ruling simply because he disagrees with it. His only recourse is to demonstrate "mistake, inadvertence, surprise, or excusable neglect . . . newly discovered evidence . . . fraud . . . [a] void judgment," that the "judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed . . . or it is no longer equitable that the judgment should have prospective application," or for "any . . . reason justifying [such] relief." FED. R. CIV. P. 60(b).

Because the plaintiff's motion fails to demonstrate any of the bases for relief from judgment, the court denies his request.

C. Legal Standard for Rule 11 Sanctions

Under Federal Rule of Civil Procedure 11, the court may impose sanctions on attorneys or unrepresented parties if "a pleading, written motion, or other paper . . . [is] presented for any improper purpose[;] . . . the claims, defenses, and other legal contentions therein are [un]warranted by existing law[;] . . . the allegations and other factual contentions have [no] evidentiary support[; or] the denials of factual contentions are [un]warranted on the evidence[.]" FED. R. CIV. P. 11(b). There are procedural and substantive requirements set forth in the Rule that must be met before a court may impose sanctions. *See Edmond v. United States Attorney*, 959 F. Supp. 1, 5 (D.D.C. 1997); *see generally* 2-11 Moore's Federal Practice § 11.23 (2004).

Rule 11 mandates that sanctions be imposed only "after notice and a reasonable opportunity to respond[.]" FED. R. CIV. P. 11(c); *see also Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999) (discussing the due process requirements prior to imposing sanctions that "a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter"). Rule 11 also requires that "[a] motion for sanctions . . . shall be served [on the opposing party] . . . and shall not be filed unless, within 21 days after service of [such] motion . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." FED. R. CIV. P. 11(c)(1)(A); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir.

1995) (holding that the court was precluded from granting the plaintiff's Rule 11 sanctions motion because the plaintiff failed to serve the motion on the defense counsel, which deprived the defense counsel of the 21 day safe harbor to withdraw or correct the alleged offending conduct); *U.S. v. BCCI Holdings (Luxembourg), S.A.*, 176 F.R.D. 1, 2 (D.D.C. 1997) (concluding that "the government's letter to petitioners' counsel [was] too tentative to provide the functional equivalent of 'safe harbor' notice").

Rule 11 also requires that a motion for sanctions be filed separately from other motions or requests and describe the specific conduct that is allegedly deserving of sanctions. FED. R. CIV. P. 11(c)(1)(A); *see also Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1323, 1328 (2d Cir. 1995 (denying a request for sanctions that the movant included in his motion to dismiss); *S.E.C. Rivlin*, No. 99-1455, 1999 WL 1455758, at *6 (D.D.C. 1999) (denying Rule 11 sanctions because the motion was added to the end of the amended answer).

As for the substantive requirements of Rule 11, the court applies "an objective standard of reasonable inquiry on represented parties who sign papers or pleadings." *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises*, 498 U.S. 533, 554 (1991). The imposition of Rule 11 sanctions is not something the court takes lightly; Rule 11 sanctions are an extreme punishment for filing pleadings that frustrate judicial proceedings. *Trout v. Garrett*, 780 F. Supp. 1396, 1428 (D.D.C. 1991) (noting that "the blunt instrument of sanctions against individual attorneys ought to be applied with restraint"). When a party's motion is "sufficiently well grounded and warranted by existing law," the party's failure to sustain his or her burden of proof on the motion "does not ipso

facto violate the standards of Rule 11." *Bantefa v. Tyson*, No. CIV.A. 84-3937, 1987 WL 8710, at *1 (D.D.C. 1987) (denying the defendant's motion for sanctions that was filed in response to plaintiff's unsuccessful motion for relief from judgment). Similarly, where a party's "request for a stay of proceedings is based upon good faith assessments and due diligence efforts," sanctions are inappropriate under the substantive requirements of Rule 11. *Edmond*, 959 F. Supp. at 5 (finding that there was a lack of malicious motive in the defendant's request for a stay of the proceedings). On the other hand, a district court does not abuse its discretion when it imposes Rule 11 sanctions against a defendant whose counterclaims are designed primarily to harass the plaintiff. *Marina Mgmt. Services, Inc. v. Vessel My Girls*, 202 F.3d 315, 325 (D.C. Cir. 2000) (finding sanctionable a defamation counterclaim "which included allegations not necessarily integrally linked to the legitimacy of the debt recovery action"); *see also Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 43-44 (D.C. Cir. 1990) (affirming the district court's finding that the defendant "failed to make a reasonable inquiry into the factual basis of the amended complaint" and upholding the imposition of Rule 11 sanctions).

The court also has the authority to impose Rule 11 sanctions sua sponte. FED. R. CIV. P. 11(c)(1)(B). This inherent power, as the D.C. Circuit recognized, "guard[s] against abuses of the judicial process." *Shepherd v. Am. Board. Co.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995). In this regard, Rule 11 serves the purpose of protecting the court from "frivolous and baseless filings that are not well grounded, legally untenable, or brought with the purpose of vexatiously multiplying the proceedings." *Cobell v. Norton*, 211 F.R.D. 7, 10 (D.D.C. 2002) (quoting *Cobell v. Norton*, 157 F. Supp. 2d 82, 86 n.8 (D.D.C. 2001)). If the court determines that the motive and intent of the

offending party is to harass the other party, or that a party has otherwise violated Rule 11(b), it has the inherent power to consider a Rule 11 sanctions motion sua sponte by issuing an order directing the offending party to show case why it has not violated Rule 11(b). FED. R. CIV. P. 11(c)(1)(B); *see McLaughlin v. Brandlee*, 602 F. Supp. 1412 (D.D.C.1985), *aff'd* 803 F.2d 1197 (D.C. Cir.1986). When exercising its discretion and imposing sanctions sua sponte, the court is not required to provide the party with the safe harbor period, as is required in Rule 11(c)(1)(A). *Compare* FED. R. CIV. P. 11(c)(1)(B) (containing no explicit safe harbor provision) *with* FED. R. CIV. P. 11(c)(1)(A) (containing an explicit safe harbor provision); *see, e.g., Elliot v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) (distinguishing between the safe harbor required when sanctions are requested by motion and the absence of the safe harbor requirement when the court is acting sua sponte). The court further notes that a frivolous Rule 11 sanction motion may itself be a violation of Rule 11. FED. R. CIV. P. 11.

Finally, this court has the "discretion to determine both whether a Rule 11 violation has occurred and what sanctions should be imposed if there has been a violation." *Cobell*, 211 F.R.D. at 10 (citations omitted). This court's grant or denial of a Rule 11 motion for sanctions is reviewed under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Geller*, 40 F.3d at 1303.

D. The Court Determines that Sanctions are not Appropriate

The defendant-intervenor moved the court to sanction the plaintiff and his counsel. Fairchild's Mot. for Summ. J. But, because the law requires that motions for sanctions be filed independent of other motions or

request, the court sua sponte ordered the plaintiff to show cause why sanctions should not be imposed pursuant to Rule 11(c)(1)(B) of the Federal Civil Procedure Rules. Mem. Op. (May 12, 2005) at 13.

Procedurally, the court may impose sanctions only "after notice and a reasonable opportunity to respond[.]" FED. R. CIV. P. 11(c). On May, 12, 2005, the court provided the plaintiff with the requisite notice by ordering the plaintiff to "show cause by June 1, 2005, why he and his lawyer should not split the costs of defendant-intervenor Fairchild and defendant FAA." Mem. Op. (May 12, 2005) at 14. In response, on May 31, 2005, the plaintiff filed a "memorandum in support of the showing why the plaintiff believes the court's decision is wrong and why sanctions are inappropriate," which, in additional to containing a motion for relief from judgment, responded to the court's show cause order. *See* Mot. to Reconsider at 6-8.

Sanctions are appropriate if, *inter alia*, "the claims, defenses, and other legal contentions therein are [un]warranted by existing law." FED. R. CIV. P. 11(b). The plaintiff argues that sanctions are inappropriate, however, because he "feels that neither he nor his attorney should be limited because someone else may have waived a possible argument in a related case." Mot. at 7. Contrary to the plaintiff's assertion, however, Herrick is not simply "someone else." *Id.* Rather, he is in privity with the plaintiff in this case. Mem. Op. (May 12, 2005) at 8. Furthermore, contrary to the plaintiff's contention that the "someone else *may have* waived a possible argument," Mot at 7, the Tenth Circuit unambiguously held that the court "decline[s] to overturn the district court's judgment on a point that the plaintiff has failed to challenge on appeal." *Herrick v. Harvey*,

298 F.3d 1184, 1194 n.10 (10th Cir. 2002).

The plaintiff and Herrick's lawsuits are identical, and the plaintiff and Herrick are in privity. Mem. Op. (May 12, 2005) at 7-8. For this reason, the doctrine of res judicata quite simply precludes the plaintiff's case in this court. The court concludes that the lawsuits are identical, Herrick and the plaintiff are in privity, and no supervening change in the law has occurred, and the court wonders how plaintiff's counsel does not know that the plaintiff's claims are "unwarranted by existing law," the requisite for the imposition of sanctions under Rule 11. FED. R. CIV. P. 11(b).

Rule 11 sanctions are an extreme punishment for filing pleadings that frustrate judicial proceedings, *Trout*, 780 F. Supp. at 1428, and are properly imposed for litigation which "vexatiously multipl[ies] the proceedings," *Cobell*, 211 F.R.D. at 10. Nevertheless, the court hesitatingly determines that plaintiff's counsel has not reached the threshold of sanctionable behavior, though he has come adoringly to its doorstep.

Plaintiff's counsel is correct that he should be free to "diligently and zealously pursue the interests of his client within the bounds of the law." Mot. at 7-8. In this instance, however, his zeal fostered carelessness, which took him to the edge of acceptability, and to the brink of an unpleasant rendezvous with Rule 11.

IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiff's motion for relief from judgment. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 6th day of February, 2006.

RICARDO M. URBINA
United States District Judge

PETITIONER'S BRIEF

662

85

6

48pg

No. 07-371

FILED
FEB 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S BRIEF

MICHAEL JOHN PANGIA
THE LAW OFFICES OF MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

February 2008

QUESTION PRESENTED

Can a non-party be bound by the judgment in a case under the theory that he was "virtually represented" by a party to the case when the non-party had no legal relationship with the party and did not receive notice of the litigation?

PARTIES TO THE PROCEEDINGS

Brent Taylor was the appellant in the court below and is the petitioner in this Court. The Fairchild Corporation and Marion C. Blakey, Administrator, Federal Aviation Administration, were appellees in the court below. Robert A. Sturgell, Acting Administrator, Federal Aviation Administration, has been substituted for Marion C. Blakey, and Mr. Sturgell and the Fairchild Corporation are respondents in this Court.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. Brent Taylor's FOIA Request 1

B. Greg Herrick's Litigation 2

C. Proceedings Below 3

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. A Party "Represents" a Non-Party for Purposes of Preclusion Only If There Is a Legal Relationship Between Them Under Which the Party Is Accountable to the Non-Party for the Conduct of the Litigation. 9

II. The Factors in the Lower Courts' "Virtual Representation" Tests Do Not Replace the Need for a Legal Relationship. 19

A. The Five Factors in the D.C. Circuit's Test Do Not Ensure the Special Representational Relationship Necessary for the Application of Res Judicata. 19

1. Identity of interests and adequate representation 19

2. A close non-legal relationship 20

3. Tactical maneuvering 22

4. Substantial participation 25

B. The Court of Appeals' Virtual Representation Test Does Not Advance the Purposes of Res Judicata. 28

C. The Nature of the Claim on the Merits Does Not Alter the Need for a Legal Relationship Between the Party and Non-party. 30

III. At the Very Least, in the Absence of a Legal Relationship Between a Party and Non-Party, Notice Is Required for a Non-Party to Be Bound by the Judgment in a Case. 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases:

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 17

Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 193 F.3d 415 (6th Cir. 1999) 6, 11

Bedingfield v. Jefferson County,
527 So.2d 1270 (Ala. 1988) 11

Bigelow v. Old Dominion Copper & Mining Co.,
225 U.S. 111 (1912) 15, 25, 26

Bittinger v. Tecumseh Products Co.,
123 F.3d 811 (1997) 28

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 10

Brown v. Felsen,
442 U.S. 127 (1979) 28, 29

Collins v. E.I. Dupont de Nemours & Co.,
4 F.3d 172 (3d Cir. 1994) 20

Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215 (1923) 35

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 31

Devlin v. Scardelletti,
536 U.S. 1 (2002) 17

East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) 17

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 17

FEC v. Akins,
524 U.S. 11 (1998) 32

In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation,
55 F.3d 768 (3d Cir. 1995) 17

Gonzalez v. Banco Central Corp.,
27 F.3d 751 (1st Cir. 1994) 11, 35

Greene v. Lindsay,
456 U.S. 444 (1982) 33, 35

Hansberry v. Lee,
311 U.S. 32 (1940) ..... *passim*

Herrick v. Garvey,
298 F.3d 1184 (10th Cir. 2002) 2, 3

Jones v. Flowers,
547 U.S. 220 (2006) 34

Litchfield v. Crane,
123 U.S. 549 (1887) 21, 26

Lockport v. Citizens for Community Action at the Local Level, 430 U.S. 259 (1977) 15

Lovejoy v. Murray, 70 U.S. 1 (1865) 26, 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 31

Martin v. America Bancorp. Retirement Plan, 407 F.3d 643 (4th Cir. 2004) 6, 11

Martin v. Wilks, 490 U.S. 755 (1996) ..... *passim*

Massachusetts v. Mellon, 262 U.S. 447 (1923) 31

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 35

Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir. 1990) 11

Montana v. United States, 440 U.S. 147 (1979) 10, 26, 27

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 9, 12, 33, 34, 36

Nevada v. United States, 463 U.S. 110 (1983) 14

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 9, 17

Parklane Hosiery Co., Inc. v. Shore,
439 U.S. 322 (1979) 10

Pedrina v. Chun,
97 F.3d 1296 (9th Cir. 1996) 22, 23

Peralta v. Heights Medical Center,
485 U.S. 80 (1988) 34

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 17, 32, 34

Pollard v. Cockrell,
578 F.2d 1002 (5th Cir. 1978) 6, 18

Reynolds v. Beneficial National Bank,
288 F.3d 277 (7th Cir. 2002) 17

Richards v. Jefferson County,
517 U.S. 793 (1996) ..... *passim*

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999) 13, 20, 21, 33

Stryker v. Crane,
123 U.S. 527 (1887) 26

Tice v. America Airlines, Inc.,
162 F.3d 966 (7th Cir. 1998) 6, 17, 18

Tulsa Professional Collection Servives, Inc. v. Pope, 485 U.S. 478 (1988) 34, 35

Tyus v. Schoemehl,
93 F.3d 449 (8th Cir. 1996) 5, 11, 22, 23

Constitutional Provision, Statutes, and Rule:

United States Constitution, amendment V 1

5 U.S.C. § 552(a)(3) 1

5 U.S.C. § 552(a)(4)(B) 1, 25, 32

5 U.S.C. § 552(b) 1

5 U.S.C. § 552(b)(4) 2

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P. 23 ..... 10, 17

Other Authorities:

Advisory Committee Notes to Fed. R. Civ. P.
23, 39 F.R.D. 98 (1966) 17

Black's Law Dictionary (7th ed. 1999) 30

Simon Greenleaf, A Treatise on the Law of
Evidence (13th ed. 1899) 15

Comment, *Privity & Mutuality in the Doctrine of Res Judicata*, 35 Yale L.J. 607 (1926) 15

Restatement (Third) of Agency (2006) 35

Restatement (Second) of Judgments (1982) 15, 16, 18, 27

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) 29

C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure (2002) 26

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 490 F.3d 965 (D.C. Cir. 2007), and is reproduced in the appendix to the petition for a writ of certiorari at 1a. The district court's unreported Memorandum Opinion granting respondents' motions for summary judgment is available at 2006 WL 279103 and is reproduced in the appendix to the petition for a writ of certiorari at 22a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 22, 2007. The petition for a writ of certiorari was filed on September 17, 2007, and was granted on January 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case presents the question whether Petitioner Brent Taylor's Freedom of Information Act (FOIA) suit is precluded by the judgment in a prior FOIA case in which Taylor was not a party.

A. Brent Taylor's FOIA Request

FOIA provides any person a statutory right to request and receive records from federal agencies, subject to certain exemptions. *See* 5 U.S.C. §§ 552(a)(3), (b). It also gives requesters the right to seek judicial review when agencies deny their requests. *Id.* § 552(a)(4)(B).

In August 2002, Taylor, the executive director of the Antique Aircraft Association, made a FOIA request to the Federal Aviation Administration (FAA) for records related to a 1930s vintage airplane known as the Fairchild F-45. Three months later, having never received a response from the FAA, he filed an administrative appeal of the constructive denial.

B. Greg Herrick's Litigation

Prior to Taylor's request, Greg Herrick, another member of the Antique Aircraft Association, had made his own FOIA request for records related to the F-45 and had litigated the case up to the Tenth Circuit. *See Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002). Herrick owned an F-45 and stated that he wanted the records in order to restore it. *Id.* at 1188. The FAA argued that the requested records were exempt from disclosure as trade secrets under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). The Tenth Circuit determined that the records stopped being trade secrets in 1955 when the Fairchild Engine and Airplane Company, which had submitted them to the government, gave the government permission to lend them to members of the public. *Herrick*, 298 F.3d at 1194. Nonetheless, the court of appeals affirmed the district court's grant of summary judgment to the government on the ground that the Fairchild Corporation's current refusal to consent to public dissemination of the records "restored" their status as trade secrets. *Id.* at 1195.[1]

---

[1]The Court also held that the Fairchild Corporation was the corporate successor to the Fairchild Engine and Airplane Company and was now the owner of any trade secret rights in the records. *Id.* at 1192-93.

The Tenth Circuit recognized that its decision, like that of the district court, rested on two critical legal assumptions: first, that documents that have lost their trade secret status because their owner granted permission for them to be released to the public can have that status restored if the owner revokes that permission; and, second, that whether a record is a trade secret is determined by the facts that exist when the agency makes its final decision whether to release the records, not by the facts that existed when the requester asked for the records. *Id.* at 1194 n.10. According to the court of appeals, Herrick had not challenged either of these legal assumptions on appeal. Unwilling to "overturn the district court's judgment on a point that the plaintiff has failed to challenge on appeal," the court of appeals also "assume[d], without deciding," that the district court's premises were correct. *Id.*

C. Proceedings Below

In February 2003, having received no response from the agency to his own FOIA request or his appeal of its constructive denial, Taylor filed this action in the United States District Court for the District of Columbia. J.A. 14-19. Taylor hired Michael J. Pangia, the lawyer who had represented Herrick in the Tenth Circuit case, to represent him in the administrative appeals process and in court. *Id.* at 19, 22-23.

Taylor and the FAA agreed on a stay to give the agency time to respond to Taylor's FOIA request. The agency eventually denied the request, claiming the requested records contain trade secrets. *Id.* at 38-41. After Taylor administratively appealed the denial, the FAA denied the appeal as well. *Id.* at 42-52. Taylor then filed a motion to allow discovery, seeking information about the extent to which the requested records had been

guarded as trade secrets and whether they had reacquired trade secret status. In describing how the Tenth Circuit's decision in *Herrick v. Garvey* was based on assumptions rather than decisions about critical issues, the motion noted that Herrick had asked Taylor for help fixing his F-45 plane. *Id.* at 32. The court denied the motion for discovery as premature.

The Fairchild Corporation intervened, and both Fairchild and the government moved for summary judgment, arguing, among other things, that Taylor should be precluded from litigating his case because he had been "virtually represented" by Herrick in *Herrick v. Garvey*. Both defendants argued that Taylor was in privity with Herrick, but neither submitted any evidence about the relationship between Herrick and Taylor. In its statement of material facts, however, Fairchild referred to Herrick as a "close associate of Taylor's," J.A. 54, an otherwise unexplained characterization that Taylor did not dispute because he did not believe it had any legal significance. Similarly, both defendants argued that Taylor's case was an attempt by Herrick and Pangia to circumvent the Tenth Circuit's decision in *Herrick v. Garvey*, but neither submitted any evidence that Herrick had directed or asked Taylor to file the FOIA request or lawsuit, or that Pangia had any role in bringing the litigation aside from serving as Taylor's attorney. Further, neither defendant submitted any evidence that Taylor had known about Herrick's case while it was ongoing. Nonetheless, the district court granted defendants' motions, holding that "Herrick was Taylor's 'virtual representative' in *Herrick v. Harvey* [sic] so as to preclude the instant case." Pet. App. 22a.

The court of appeals affirmed. According to the court, "a nonparty's claim [can be] precluded by a prior

suit based upon a particular form of privity known as 'virtual representation.'" *Id.* at 6a. Under that theory, the court explained, "the party to the prior litigation is treated as the proxy of the nonparty," on the ground that the party adequately represented the non-party, "with the result that the nonparty is barred from raising the same claim." *Id.*

The court noted that "other circuits vary widely in their approach to virtual representation," *id.* at 7a, contrasting, in particular, the Fourth Circuit, which "treats a party as a virtual representative only if the party is 'accountable to the nonparties who file a subsequent suit' and has 'the tacit approval of the court' to act on the nonparty's behalf," *id.* (*quoting Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987)), and the Eighth Circuit, which has identified "several factors to consider" in determining whether a party has virtually represented a non-party, but ultimately holds that "'[d]ue to the equitable and fact-intensive nature of virtual representation, there is no clear test for determining the applicability of the doctrine.'" *Id.* (*quoting Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996)). The court of appeals then adopted a five-factor test for determining whether a nonparty had been virtually represented by a party to a suit. It held, first, that two factors are necessary for virtual representation: an identity of interests between the party and non-party; and adequate representation of the non-party by the party. In addition, it held that virtual representation requires a showing of at least one of three other factors: a close relationship between the party and the non-party; substantial participation by the non-party in the case; or tactical maneuvering by the non-party to avoid preclusion by the judgment in the case. *Id.* at 8a.

Starting with identity of interests, the court of appeals acknowledged that the district court had erred in stating that Taylor had agreed to help Herrick restore his aircraft. However, it nonetheless found that Taylor and Herrick had an identity of interests because they wanted the same result (access to records) and Herrick had as much incentive as Taylor to achieve it. *Id.* at 9a-10a.

Turning to adequacy of representation, the court noted that the facts in the record did "not show that Taylor had notice of Herrick's lawsuit while it was ongoing," *id.* at 13a, but held that notice was not a necessary condition for virtual representation. In doing so, it acknowledged that it was disagreeing with other circuits that "have treated notice as necessary for a finding of virtual representation." *Id.* at 12a-13a (citing *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir. 2001), and *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)). The court found adequate representation based on Herrick's incentive to litigate zealously and Taylor's hiring of Pangia, the lawyer who had represented Herrick. The court did not undertake an examination of Herrick's and Pangia's conduct during *Herrick v. Garvey* to determine whether, in fact, they had provided Taylor with adequate representation.

With regard to whether Herrick and Taylor had a close relationship, the court noted that "unlike the [Fourth, Fifth, and Sixth Circuits], we do not believe that only a legal relationship may qualify as a close relationship." *Id.* at 15a (citing *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 424 (6th Cir. 1999) (en banc); and *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978)). Noting

that Herrick had asked Taylor for help restoring his airplane, that Herrick had given Taylor some information he obtained through discovery in his earlier case, and that Taylor did not oppose the characterization of Herrick as his "close associate," the court held that Taylor and Herrick had a close enough relationship to establish that Herrick had virtually represented Taylor. *Id.* at 15a-16a.

Finally, the court noted that "some forms of tactical maneuvering . . . are probative of collusion or otherwise indicative of privity and therefore should be considered a factor supporting virtual representation." *Id.* at 16a. The court explained, however, that the record did "not necessarily show collusion to avoid preclusive effects of *Herrick*," because Taylor "could have read about *Herrick* and acted on his own to file an identical FOIA request, and passing along documents obtained through discovery is something Herrick might have done even for someone with whom he was not in cahoots." *Id.*

The court did not find that Taylor and Herrick had entered into any agreement or had any discussions about how Herrick's case would be conducted, that they had undertaken any concerted action, or that Taylor had given Herrick authority to represent him. Nonetheless, having found an identity of interests, adequate representation, and a close relationship between the parties, the court held that the requirements for virtual representation were met. Thus, even though Taylor was not a party to Herrick's lawsuit, he was precluded from litigating his own FOIA claim. *Id.*

SUMMARY OF ARGUMENT

The United States has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (internal citations omitted). It is a fundamental principle of American jurisprudence, protected by the Constitution's due process guarantee, that a judgment in a lawsuit "does not conclude the rights of strangers to th[e] proceedings." *Id.* (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)).

The court of appeals held that Taylor received his day in court, and all the process he was due, in *Herrick v. Garvey*, a case in which he was not a party and of which had no notice. But although Taylor and Herrick were not strangers in a colloquial sense, Taylor was a stranger to Herrick's case: Taylor and Herrick did not share a relationship that would have made Herrick understand his suit to be on Taylor's behalf, or that would have caused the Tenth Circuit to take care to protect Taylor's interests. *See Richards*, 517 U.S. at 802.

Neither due process nor common-law principles of preclusion permit a non-party to be bound by the judgment in a case on the theory that a party represented his interests unless the party had authority to represent the non-party at the time of the case. For preclusion to apply, the party and non-party must have had a legal relationship during the case under which the party was accountable to the non-party for the conduct of the case. The factors considered in the court of appeals' multifactor test cannot replace the need for such a legal relationship, and the uncertainty caused by the test undermines the finality, predictability, and desire to conserve judicial resources that motivate preclusion doctrine. Moreover, the "public-law" nature of this case does not

justify denying Taylor his day in court; both due process and normal preclusion rules apply in cases against the government.

Even if a legal relationship were not necessary for preclusion, the decision below should be reversed because Taylor did not have notice of *Herrick v. Garvey*. "Th[e] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Although not sufficient for the application of res judicata, in the absence of a legal relationship between a party and non-party notice is a bare necessity for the non-party to be bound, and Herrick's knowledge of his case cannot be imputed to Taylor.

ARGUMENT

I. A Party "Represents" a Non-Party for Purposes of Preclusion Only If There Is a Legal Relationship Between Them Under Which the Party Is Accountable to the Non-Party for the Conduct of the Litigation.

1. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Richards*, 517 U.S. at 798. This general principle that a non-party is not bound by the results of litigation is incorporated in the due process protections of the United States Constitution. Because "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings," *Richards*, 517 U.S. at 797

n.4 (quoting *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918)), and because non-parties "never had a chance to present their evidence and arguments on the claim," *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971), "[d]ue process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Id.* "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

This Court has recognized that the "principle of general application" that non-parties are not bound has narrow exceptions in instances "where the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." *Hansberry*, 311 U.S. at 43. Of particular relevance, this Court has recognized an exception in "limited circumstances" in which a non-party to the first case "has his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 490 U.S. at 762 n.2. In particular, this "adequate representation" exception applies in class or representative cases, *id.* (citing *Hansberry*, 311 U.S. at 41-42, and Fed. R. Civ. P. 23), and when the non-party controls a party's litigation of the case. *Id.* (citing *Montana v. United States*, 440 U.S. 147, 154-55 (1979)).[2]

---

[2] The Court has also stated that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Id.* The remedial-scheme exception is not at issue in this case.

In its decision below, the D.C. Circuit placed the virtual representation theory it crafted within this rubric of "adequate representation," stating that the idea behind virtual representation "is that some cases of successive litigation involve as a litigant 'a nonparty [to the original action] whose interests were adequately represented by a party the original action.'" Pet. App. 6a (quoting *Tyus*, 93 F.3d at 454, and citing *Martin v. Wilks*, 490 U.S. at 762 n.2). Other courts that have adopted a theory of "virtual representation" have also tended to consider it a form of "adequate representation." *See, e.g., Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d at 651; *Becherer*, 193 F.3d at 423; *Tyus*, 93 F.3d at 454; *Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1266-67 (5th Cir. 1990); *but see Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 762 (1st Cir. 1994) ("[A]dequacy of representation is not itself a separate and inflexible requirement for engaging principles of virtual representation[.]").

Although this Court has recognized preclusion based on "adequate representation," the fact that a case was adequately litigated does not, alone, bind non-parties to the results. In *Richards v. Jefferson County*, the Court considered whether—outside of the context of class or representative actions and cases in which a non-party controlled the litigation— non-parties could be bound to a judgment on the ground that they had been "adequately represented" by a party to the litigation. 517 U.S. 793. *Richards* was a challenge to a county occupation tax on behalf of employees subject to the tax. The Alabama Supreme Court held that the *Richards* plaintiffs' claims were barred by the judgment in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), a prior case challenging the tax, because the *Bedingfield* plaintiffs supposedly had adequately represented the interests of the *Richards* plaintiffs.

This Court reversed. First, the Court pointed out that the *Richards* plaintiffs had not received notice of the *Bedingfield* case, a fact it found troubling because "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Richards*, 517 U.S. at 799 (quoting *Mullane*, 339 U.S. at 314). Even assuming, however, that "in some class suits adequate representation might cure a lack of notice," *id.* at 801—a proposition the Court seemed to find doubtful, *id.*—the Court held that its precedents could not support the application of res judicata under the circumstances of the case.

The Court explained that, under *Hansberry v. Lee*, 311 U.S. 32, "a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is conducted as to insure the full and fair consideration of the common issue.'" *Richards*, 517 U.S. at 801 (quoting *Hansberry*, 311 U.S. at 43). Because the *Bedingfield* plaintiffs "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties," the Court found "no reason to suppose that the *Bedingfield* court took care to protect the interests of [the *Richards* plaintiffs] in the manner suggested in *Hansberry*," or that "the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers." *Id.* at 801-02. Accordingly, the Court concluded that it could not find that the *Bedingfield* plaintiffs had represented the *Richards* plaintiffs in a constitutionally adequate manner. *Id.* at 802.

Under *Richards*—and *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), which held that *Richards*'s requirements apply even when a non-party knew of the litigation—a non-party may be bound by the results of a case only if a party to the case "assumed to exercise" the power of representing the non-party. *Richards*, 517 U.S. at 802 (quoting *Hansberry*, 311 U.S. at 46). The party and non-party must share a "special *representational* relationship," *S. Cent. Bell Tel. Co.*, 526 at 168 (emphasis added), one that causes the party to recognize that the suit is on behalf of the non-party and, accordingly, to have an obligation to protect the non-party's interests. Absent such a relationship, the non-party and party "are best described as mere 'strangers' to one another," and "due process prevents the former from being bound by the latter's judgment." *Richards*, 517 U.S. at 802 (quoting *Martin v. Wilks*, 490 U.S. at 762).

Here, as in *Richards*, Herrick did not sue on behalf of a class, his pleadings did not purport to be on behalf of Taylor or any other non-parties, and the judgment he received did not purport to bind any non-parties. Moreover, there was no relationship between Herrick and Taylor at any time during Herrick's case (or, for that matter, after Herrick's case), that would have led Herrick to understand his case to be on behalf of Taylor, or that would have caused the Tenth Circuit to protect Taylor's interests in the manner suggested by *Hansberry*. Indeed, the Tenth Circuit assumed without deciding two dispositive legal conclusions on the ground that Herrick had not challenged them on appeal, although doing so failed to protect the interests of non-parties, like Taylor, who might be interested in the records requested by Herrick, but who were not involved in determining Herrick's litigation strategy. Thus, although they were ac-

quainted with each other, Herrick and Taylor were "mere 'strangers'" for the purposes of res judicata, and "due process prevents the former from being bound by the latter's judgment." *Richards*, 517 U.S. at 802 (citation omitted).

2. For it to be said that a party has assumed the power of representing a non-party, and for the party to understand that he is representing the non-party's interests and has an obligation to take care to protect those interests, the party must have authority to represent the non-party. That is, the party and non-party must have a legal relationship under which the party is accountable to the non-party for the conduct of the litigation. *Cf. Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983) (explaining that because the government represented the Pyramid Lake Paiute Tribe in prior litigation, the Tribe's "remedy is against the Government," not third parties). This legal relationship can be a preexisting relationship that provides the party with authority to litigate on the non-party's behalf, such as the relationship between a guardian and ward, or the relationship can be created by an agreement between the party and non-party that the party will represent the non-party in the case. Because the non-party's interests must be protected during the party's case, however, and because the party must have assumed the power of representing the non-party in *that case*, the relationship of legal accountability between the party and non-party must exist at the time of the case for the case's judgment to bind the non-party in later cases.

The need for a legal relationship between the party and the non-party against whom preclusion is invoked is reflected in common-law preclusion principles. Even when it has not relied expressly on the Constitution's

due process guarantees, the Court has emphasized the "deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. at 762 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4449, p. 417 (1st ed. 1981)), and rejected the application of res judicata where "plaintiffs had not been parties to the earlier suit and were not in privity" with the party that brought it. *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n.7 (1977). Traditionally, privity "denote[d] a mutual or successive relationship to the same rights of property." 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 523 (13th ed. 1899); *see also Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 128-29 (1912). A privy, within the "generally accepted rule," was narrowly limited to "one who claims an interest in the subject-matter affected by the judgment *through or under* one of the parties, *i.e.*, either by inheritance, succession or purchase." Comment, *Privity & Mutuality in the Doctrine of Res Judicata*, 35 Yale L.J. 607, 608 (1926) (emphasis in original).

In *Richards*, this Court noted that "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards*, 517 U.S. at 798. Even this expanded concept of privity, however, requires a legal relationship between the party and non-party for the non-party to be bound under the theory that he was adequately represented in the first suit. As examples of privity, *Richards* explained that "a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust," and, as support for the notion that privity had expanded beyond its traditional terms, it cited to chapter four of the Restatement (Second) of Judgments, entitled "Parties and Other Persons

Affected by Judgments." Section 41, in that chapter, lists relationships that cause a person to be "represented by a party," all of which are relationships that, before or at the initiation of the first litigation, "confer on the representative the requisite authority, and generally the exclusive authority, to participate as a party on behalf of the represented person." Restatement (Second) of Judgments § 41, & cmt. a (1982). The "close associate" relationship between Herrick and Taylor is a far cry from these preexisting representational relationships, and, thus, like due process, common-law preclusion principles forbid the application of res judicata in this case.

3. Among the persons listed as representatives by the Restatement is "the representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member." *Id.* § 41(1)(e). The class action—the prototypical case in which adequate representation serves as the basis for res judicata—provides useful principles defining the type of relationship necessary for res judicata based on adequate representation outside of the class action context as well. The relationship between class representatives and absent class members is a legal one under which the class representatives have legal duties to the absent class members. The judicial process through which that relationship is created provides the class representatives legal authority to represent the absent class members. And the relationship exists at the time of the class action litigation so that both the class representatives and the court itself can take steps to protect the interests of the absent class members.

Class actions may bind absent class members, but, before they do, they must provide class members with specific protections upfront. *See Hansberry*, 311 U.S at

43 (requiring procedures "devised and applied" to protect absent class members); Fed. R. Civ. P. 23(a) & (b) (setting forth prerequisites of numerosity, commonality, typicality, and adequacy of representation, and requiring that a class action fit within one of three class-action categories that define the types of cases in which class treatment is appropriate). In class actions, the court, along with the class representatives and their lawyers, have a duty to protect the interests of the absent class members. *See, e.g., Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85, 805 (3d Cir. 1995). This Court, lower courts, and rules committees have all spent significant time determining the requirements for certifying classes and litigating and settling class cases. *See, e.g., Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Ortiz*, 527 U.S. 815; *Amchem Prods., Inc v. Windsor*, 521 U.S. 591 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); Fed. R. Civ. P. 23; Adv. Comm. Notes to Fed. R. Civ. P. 23, 39 F.R.D. 98-107 (1966). Those requirements and the due process principles enshrined in them would be undermined if non-parties could be bound as though they were part of a properly certified class action when they had no legal relationship to the parties in the binding litigation at the time of that litigation. As the Seventh Circuit has pointed out, "[t]here would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will." *Tice*, 162 F.3d at 973. Respondents should not be permitted to turn Greg Herrick's case, which was not a class action, into a de facto class action without any of the upfront protections provided to absent class members.

4. The limits on the circumstances in which non-parties can be bound to a judgment based on their representation by parties to the action call into question whether the term "virtual representation" is useful in determining whether such representation took place. As noted above, in *Richards*, the Court provided the examples of judgments that bind guardians and trustees also binding wards and beneficiaries, and cited to the Restatement (Second) of Judgments, Ch. 4, in describing the term "privity." *Richards*, 517 U.S. at 798. Other courts have placed similar relationships within the rubric of "virtual representation." *See Pollard*, 578 F.2d at 1008-09 (explaining that the types of relationships contemplated as qualifying for virtual representation are "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee") (quoting *S.W. Airlines Co. v. Tex. Int'l Airlines*, 546 F.2d 84, 97 (5th Cir. 1977)).

If the time-honored term "privity" is used to describe such relationships, there is no need for an additional term also reflecting the conclusion that a party and a non-party have a relationship sufficient to bind the non-party to the results of the case. *See Tice*, 162 F.3d at 971 ("The difficult question here is to decide what an idea of 'virtual' representation legitimately can add to the law of preclusion that is not already captured by a flexible inquiry into what used to be called 'privity.'"). The term "virtual representation," as used by the D.C. Circuit and other lower courts, has provided no additional analytical force, but has led to the undermining of non-parties' due process rights and common-law preclusion principles. Whether the Court adopts the term "virtual representation," however, or whether it stays with the term "privity," there are "limits on the . . . exception," *Richards*,

517 U.S. at 798, and non-parties to a case cannot be precluded based on the theory that they were adequately represented by a party to the case if they did not have a relationship of legal accountability with that party.

II. The Factors in the Lower Courts' "Virtual Representation" Tests Do Not Replace the Need for a Legal Relationship.

A. The Five Factors in the D.C. Circuit's Test Do Not Ensure the Special Representational Relationship Necessary for the Application of Res Judicata.

The court below set forth a test that requires the consideration of five factors for determining whether a non-party is bound under a theory of virtual representation: identity of interests; adequate representation; a "close" (although not necessarily legal) relationship between the party and non-party; tactical maneuvering; and substantial participation. None of these factors replaces the need for the party and non-party to have a legal relationship under which the party is legally accountable to the non-party for the conduct of the litigation.

1. Identity of interests and adequate representation

The court below held that identity of interests and adequate representation were necessary, but not sufficient, for "virtual representation." Pet. App. 8a. That much of the lower court's analysis was correct: *Richards* establishes that these two factors cannot support preclusion absent a sufficient relationship between the party and non-party. As *Richards* held, when a non-party and party are "best described as mere 'strangers' to one another . . . due process prevents the former from being

bound by the latter's judgment." 517 U.S. at 802 (quoting *Martin v. Wilks*, 490 U.S. at 762).[3]

2. A close non-legal relationship

The court of appeals went astray in holding that a close, non-legal relationship (together with identity of interests and adequate representation) supports preclusion. It does not. People who have a close, non-legal relationship are not, of course, strangers in the colloquial sense. But, in *Richards*, this Court was not using the word "strangers" colloquially. Under *Richards*, a party and non-party are strangers if "there is no reason to suppose that the . . . court took care to protect the interests of [the non-parties] in the manner suggested in *Hansberry*," and there is no "reason to suppose that the

---

[3] The D.C. Circuit's discussion of the adequacy of representation underscores why identity of interests and adequacy of representation, without a representational relationship of legal accountability, are not sufficient. The court held that Herrick had adequately represented Taylor because Herrick had "an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than Taylor's" and because Taylor hired Herrick's lawyer, which, according to the court, "suggests satisfaction with the attorney's performance in the prior case." Pet. App. 14a. But neither of these factors looks at whether Herrick in fact provided Taylor with adequate representation. Herrick could have a strong incentive to litigate, but nonetheless not do so adequately. And Taylor's hiring of Herrick's lawyer just demonstrates that Taylor thought that the lawyer was the best one to litigate his case after the lawyer had *already* litigated Herrick's case. *Cf. S. Cent. Bell Tel. Co.*, 526 U.S. at 168 (refusing to distinguish *Richards* on ground that one of the lawyers for the plaintiffs in the second case had also represented the plaintiffs in the first case); *Collins v. E.I. Dupont de Nemours & Co.*, 34 F.3d 172, 178 (3d Cir. 1994) ("The fact that the plaintiff's attorney took part in a prior, similar action is irrelevant unless there is evidence that the plaintiff was, through his or her attorney, actually participating in the prior suit.").

[party] understood [its] suit to be on behalf of" the non-party. 517 U.S. at 802. And, under *Richards*, if the party and non-party are strangers under that definition, due process does not permit the non-party to be bound by the results of the litigation. *Id.*

In short, the word "stranger" in *Richards* describes a *conclusion* that the parties do not have a relationship sufficient to support preclusion. *See S. Cent. Bell Tel. Co.*, 526 U.S. at 167-68 ("[N]o one claims that there is 'privity' or some other special relationship between the two sets of plaintiffs. *Hence*, the Case Two plaintiffs here are 'strangers' to Case One[.]") (emphasis added); *Litchfield v. Crane*, 123 U.S. 549, 551-52 (1887) ("She was neither a party to the suit, nor in privity with those who were parties; *consequently* she was in law a stranger to the proceedings, and in no way bound thereby.") (emphasis added). The use of the word "stranger" in the Court's preclusion jurisprudence does not warrant a court asking whether the non-party knew, or was friends with, or shared a hobby with, or otherwise had a relationship with a party, short of a relationship recognized by law.

That a party and non-party have a close relationship is irrelevant unless that relationship is one that would cause the party to understand his suit to be on behalf of the non-party—that is, unless that relationship is a legal relationship under which the party was accountable to the non-party for the conduct of the litigation. It is not part of the normal expectation of "close" friends, relatives, or "associates" that they will litigate on behalf of one another, absent some agreement or legal relationship that both creates authority to do so and protects the non-party by imposing an obligation on the litigating party to look after the non-party's interest in the litiga-

tion. Best friends, for example, are "close associates" by any definition, but it would come as a great surprise to most of us to be told that we are bound by the outcomes of cases litigated by our best friends—especially litigation conducted without our knowledge. To say, as the court of appeals did, that a non-party and a party were "close associates" says nothing about whether the party had the power or the duty to represent the non-party's interests in the litigation, especially where, as here, there are no details about the nature of the close association. Accordingly, a finding that a party and non-party are "close associates" does not support the application of res judicata.

3. Tactical maneuvering

The court of appeals also stated that a non-party's tactical maneuvering to avoid preclusion, in conjunction with an identity of interests and adequate representation, supports a finding of virtual representation. Again, the court of appeals confused a legal conclusion with the facts necessary to support that conclusion. A non-party cannot be said to have engaged in improper tactical maneuvering to avoid the results of a case unless, for some reason, that non-party *already had a representational relationship* with a party to that case that would otherwise support preclusion. If the non-party did not have such a relationship with a party, then the non-party's attempt to avoid being bound by litigation in which he was not represented is not improper tactical maneuvering; it is just his effort to exercise his own right to be heard.

In support of its holding that a non-party's efforts to avoid being bound weigh in favor of preclusion of the non-party's claims, the court of appeals cited *Tyus v. Schoemehl*, 93 F.3d at 457, and *Pedrina v. Chun*, 97 F.3d 1296, 1299, 1302 (9th Cir. 1996), two cases in which par-

ties to litigation filed new litigation, on the same issue as the first litigation, along with additional, new plaintiffs. Pet. App. 16a. The courts held that all of the plaintiffs in the second set of cases were bound by the first set of cases, including the plaintiffs who had not been parties to the first cases. *Tyus*, 93 F.3d at 457-58; *Pedrina*, 97 F.3d at 1302. Rather than demonstrating why "tactical maneuvering" should weigh in favor of preclusion, however, these cases demonstrate the unfairness of basing preclusion on attempts to avoid the effects of adverse judgments. The only people who can be said to be engaging in improper tactical maneuvering in cases in which parties to a first case file a second case along with additional, new plaintiffs are the parties to the first case who are trying to avoid the result of that case by filing a second one. Because they have already litigated the case, those parties are properly held bound. But the only thing the *new* plaintiffs themselves are doing is filing a lawsuit on a topic they have never litigated before; there is nothing improper about that. Those new plaintiffs should not be precluded from receiving their first bite at the apple because of other people's improper tactical maneuvering.[4]

The D.C. Circuit cited *Tyus* and *Pedrina* for the proposition that some forms of tactical maneuvering are "indicative of privity." Pet. App. 16a. If the parties and the newly added plaintiffs indeed had a relationship at

---

[4] The newly added plaintiffs could be bound if they were litigating the case as undisclosed agents of the parties to the first case. In that situation, however, the proper basis for binding them would not be that they would be deemed to have been "represented" by the first parties because of their "maneuvering" to avoid the effect of the judgment. Rather, they would be bound because the principals for whom they were agents would be bound.

the time of the first litigation that supports the application of res judicata—a legal relationship in which the parties to the first suit were accountable to the newly added plaintiffs for the conduct of the first litigation—then the newly added plaintiffs should be bound by the judgment in the first case. But the finding of preclusion should be based on the relationship between the plaintiffs in the first and second cases, not on any attempts by the newly added plaintiffs to avoid the preclusive effects of a judgment in a case to which they were not parties.

In any event, even if tactical maneuvering to avoid the preclusive effects of a lawsuit could support preclusion, there was no tactical maneuvering here. For tactical maneuvering to be even arguably relevant to whether Herrick was representing Taylor during the course of Herrick's lawsuit, it would have to have happened before or during that lawsuit.[5] Later behavior cannot affect whether representation was occurring at the time of Herrick's litigation. There is no evidence in the record, however, of any agreement between Taylor and Herrick with regard to the first lawsuit or the underlying records, or even of any communications between Taylor and Herrick concerning the lawsuit or records before the conclusion of Herrick's suit. Moreover, there is no record evidence indicating that Taylor even knew of the

---

[5] Facts related to Taylor's and Herrick's actions after Herrick's litigation was concluded would be relevant if the question presented was whether Taylor was acting as Herrick's agent in this case. But the question here is not whether Taylor is representing Herrick in this case, but whether Herrick represented Taylor in *Herrick v. Garvey*. And even looking at Taylor's and Herrick's actions after *Herrick v. Garvey* was decided, there is no evidence that Taylor was acting as Herrick's agent in bringing this case, and neither lower court purported to find that he was.

first suit until after it was over. Under these circumstances, Taylor cannot be found to have engaged in improper tactical maneuvering to avoid the judgment in the first suit while that suit was ongoing; and if he was not bound by the judgment when it was entered, he was within his rights to try to avoid its effect by filing a new lawsuit, in one of the few places that had venue (none of which was in the Tenth Circuit, *see* 5 U.S.C. § 552(a)(4)(B)).

4. Substantial participation

Finally, without explaining what would constitute "substantial participation," the court of appeals held that substantial participation by a non-party in a suit, in combination with identity of interests and adequate representation, supports preclusion. Because Taylor did not participate in Herrick's case at all, let alone substantially, Taylor would not be bound by Herrick's litigation even if a non-party's substantial participation in a case justified binding that non-party to the results of the case. Indeed, because the lower courts did not find any such participation, let alone base their preclusion holdings on it, the Court need not reach the question whether substantial participation can justify preclusion and, if so, what type or degree of participation is necessary.

Even so, it is useful to consider the substantial participation factor because it is illustrative of the extent to which the "virtual representation" theory adopted by the lower court exceeds the proper bounds of preclusion. Contrary to the court of appeals' assertions, participation in litigation in a capacity other than as a party is not sufficient to give rise to preclusion. *See Bigelow*, 225 U.S. at 126 ("Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own

case, create an estoppel as to Bigelow."); *see also Litchfield v. Crane*, 123 U.S. at 550 (non-party's payment of part of party's expenses did not bind the non-party); *Stryker v. Crane*, 123 U.S. 527, 540 (1887) (non-party's submission of a brief did not bind the non-party); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4451, pp. 376-81 (2d ed. 2002) ("[I]t is not enough that the nonparty supplied an attorney or is represented by the same law firm; . . . helped to finance the litigation; appeared as an amicus curiae; testified as a witness; undertook some limited presentation to the court; or otherwise participated in a limited way." (citing cases)).

To be sure, this Court has held that non-parties can be collaterally estopped when they "assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Montana*, 440 U.S. at 154. Thus, in *Montana*, the Court held the United States bound by prior litigation undertaken by a government contractor, where the United States required the first suit to be filed, reviewed and approved the complaint, paid the attorneys' fees and costs, directed the appeal to the state supreme court, submitted an amicus brief, directed the filing of a notice of appeal to the Supreme Court, and effectuated abandonment of that appeal. *Id.* at 155. *Montana* reflects the longstanding recognition that "the term parties . . . includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side." *Lovejoy v. Murray*, 70 U.S. 1, 18 (1865) (quoting 1 Greenleaf on Evidence §§ 522-23). The flipside of the principle, however, is equally important:

"Persons not having these rights are strangers to the cause." *Id.*

The theory behind preclusion based on control is that the non-party controlling the litigation was not just "represented" by a party, but was effectively a party because it had its "full and fair opportunity to litigate." *Montana*, 440 U.S. at 153; *see* Restatement (Second) of Judgments § 39 cmt. a ("A person who assumes control of litigation on behalf on another has the opportunity to present proofs and argument on the issues litigated. Given this opportunity, he has had his day in court and should be concluded by the result."). Unlike control over a case, participation in a case—even if it is substantial—does not provide a non-party with a full and fair opportunity to litigate. A non-party's participation in a case does not give any party to the case authority to represent him, guarantee that he will have all his arguments heard, ensure that either the party or the court will protect his interests, or provide him the right to appeal the court's determination. For example, even if Taylor had somehow participated in Herrick's litigation, the Tenth Circuit presumably still would have assumed without deciding the resolution of the legal issues that Herrick did not raise on appeal, even though doing so did not protect Taylor's interests in the requested records. And even if Taylor had wanted to ensure that those issues were preserved on appeal, he would not have been able to do so, because he did not control the litigation. Participation as a non-party, without the ability to control the direction of the litigation, and without a relationship of legal accountability with a party to the case, cannot replace the right to have one's day in court.

B. The Court of Appeals' Virtual Representation Test Does Not Advance the Purposes of Res Judicata.

In addition to violating the rights of non-parties, the D.C. Circuit's test for virtual representation runs counter to the purposes of res judicata. Res judicata "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). But a multi-factor test in which virtual representation can be based on an undefined "close relationship" neither conserves judicial resources nor promotes certainty.

A test with factors as ill-defined as in the D.C. Circuit's test below is likely to increase "vexatious litigation" over the application of preclusion doctrine to non-parties. Instead of providing a clear rule under which courts can determine, with little effort, whether someone is bound by the results of earlier litigation, the virtual-representation test adopted by the D.C. Circuit requires courts to expend resources on determining whether res judicata applies. As the Sixth Circuit has explained, the "'virtual representation' standard converts the traditional doctrine of res judicata from a relatively clear set of rules to a vague principle relying on balancing the equities as a result of a close inspection and analysis of the relationship between the parties in each individual case." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (1997). It "increases the burden on judges, who must apply its multi-factored balancing test to the facts of each case." *Id.*

The factual nature of the D.C. Circuit's test also undermines predictability. Because of the lack of clear rules on what constitutes a relationship close enough to sustain preclusion, non-parties will not be certain about

whether their "relationships" with "associates" are sufficiently "close" to bind them to the results of litigation. Accordingly, a non-party who wants to make sure that he has the opportunity to be heard will be required to intervene in litigation brought by acquaintances (assuming he has notice of the litigation), even if the acquaintance is litigating in a foreign forum, and even though "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Martin v. Wilks*, 490 U.S. at 763 (quoting *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934)). A test that does not provide certainty about who is and is not bound by litigation also encourages races to the courthouse, as people try to make sure that their case is the one resolving their rights. Particularly in the context of FOIA, in which litigation is preceded by an administrative process, such races could lead to litigation in cases that otherwise might have been resolved informally. In contrast, a test requiring a legal relationship creates certainty in non-parties about when they will (and will not) be bound by judgments; non-parties will be able to rest assured that they will not be bound by acquaintances' litigation when they did not give those acquaintances legal authority to represent them.

A clear rule requiring a legal relationship between a party and non-party also helps ensure both fair application of preclusion principles and public perception that those principles are being applied equitably. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989) (explaining how clear legal rules help further "the appearance of equal treatment"). Although a goal of res judicata is to reduce "vexatious litigation," *Brown*, 442 U.S. at 131, res judicata cannot act as a bar to all cases judges find vexing. Judges understandably may be annoyed if forced to hear a case on

an issue that has been litigated before. Clear rules about preclusion help guarantee both that judges do not subconsciously translate their annoyance with specific issues or parties into a finding that the parties' claims are precluded and that precluded parties do not perceive judges as being motivated by irrelevant considerations when they hold them bound by cases to which they were not parties.

C. The Nature of the Claim on the Merits Does Not Alter the Need for a Legal Relationship Between the Party and Non-party.

Contrary to the district court's assertion, Pet. App. 34a, and the government's contention in its brief in opposition to the petition for certiorari, Gov't Br. Opp. 12, the "public-law" nature of the underlying action does not make virtual representation "particularly appropriate" in this case. As *Richards* makes clear, there is no public-law exception to due process or public-law relaxation of the rules of privity.

Richards itself was a "public-law" case: a constitutional challenge to a county tax. *See* Black's Law Dictionary 1244 (7th ed. 1999) (defining public law as "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself").[6] Nonetheless,

---

[6] In its brief in opposition, the government sought to distinguish *Richards* by claiming that, unlike this case, *Richards* did not involve a public-law issue. Gov't Br. Opp. 11. The government did not explain what definitions of public and private law it was using that would enable it to consider a challenge to a government tax "private" but a challenge to the government's withholding of records to which a person is statutorily entitled "public." The government's unsupported assertion that *Richards* involved a private-law issue demonstrates the malleability of the private-law/public-law distinc-

(*Footnote continued*)

the Court rejected the defendants' argument that "the character of their action renders the usual constitutional protections inapplicable." 517 U.S. at 802-03. Although the defendants had contended that "in cases raising a public issue of this kind, the people may properly be regarded as the real party in interest and thus that [plaintiffs] received all the process they were due in the [previous] action," *id.* at 803, the Court found that the case was one in which the government "may not deprive individual litigants of their own day in court." *Id.*

Richards did recognize a category of taxpayer cases in which state courts have "wide latitude to establish procedures . . . to limit the number of judicial proceedings." *Id.* In such cases—those in which the taxpayer is complaining about general misuse of public funds or some other action that only indirectly affects him—not only may states limit successive suits, but they may deny plaintiffs standing altogether. *Id.* Because of federal standing requirements, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), such cases are ones that federal courts generally do not even entertain. *See generally, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Massachusetts v. Mellon*, 262 U.S. 447, 486-89 (1923).

Like other federal court cases, and like *Richards* itself, this case is not a "public action that has only an indirect impact on [a party's] interests." *Richards*, 517 U.S. at 803. Although the purpose of FOIA is to provide the public with information, Congress accomplished that purpose by giving FOIA requesters *individual* rights to the records they request. Each person denied records

---

tion and the uselessness of those categories for determining how much process a person is due.

has suffered a personal injury, and, after exhausting the administrative process, has standing to seek judicial review of the decision in federal court. *See* 5 U.S.C. § 552(a)(4)(B); *see also FEC v. Akins*, 524 U.S. 11, 21 (1998) (describing inability to obtain information as a concrete and particular injury in fact). Accordingly, like *Richards*, this case is of the type in which the government "may not deprive individual litigants of their own day in court." *Richards*, 517 U.S. at 803. To deprive Taylor of his day in court based on Herrick's action would be to deprive him of his "'chose in action,' which [this Court has] held to be a protected property interest in its own right." *Id.* at 804 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982); *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 37).

That the "public-law" nature of this case does not permit deviation from normal due process principles does not mean that requesters may sensibly (or ethically) file suit seeking the same documents forever. FOIA requesters, like all other litigants, are bound by the stare decisis effects of prior court decisions, and, at a certain point, litigating over records that have been litigated over before becomes futile, and even frivolous. But a "court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party." *Richards*, 517 U.S. at 805. It is precedent, rather than preclusion, that binds non-parties, in "public-law" cases, as in all others.

III. At the Very Least, in the Absence of a Legal Relationship Between a Party and Non-Party, Notice Is Required for a Non-Party to Be Bound by the Judgment in a Case.

As discussed above, a non-party should not be bound by the judgment in a case without a relationship of legal accountability with a party to that case. Even if such a relationship were not necessary for preclusion, however, Taylor would not be bound by *Herrick v. Garvey* because he did not receive notice of it. Notice is not, of course, sufficient for preclusion. *See, e.g., S. Cent. Bell Tel. Co.*, 526 U.S. at 168 (explaining that case could not be distinguished from *Richards* based on plaintiffs' awareness of prior litigation); *Martin v. Wilks*, 490 U.S. at 765 ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."). Absent a legal relationship entitling a party to the case to represent a non-party, however, notice is *necessary* to bind the non-party to the judgment in the case.

The right to be heard is "[t]he fundamental requisite of due process." *Mullane*, 339 U.S. at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). As this Court has recognized, however, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.*; *see also, e.g., Richards*, 517 U.S. at 799 (quoting *Mullane*); *Greene v. Lindsay*, 456 U.S. 444, 449 (1982) (same). Accordingly, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances to apprise interested parties of the pendency of

the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also, e.g.*, *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane*); *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84 (1988) (same).[7]

In its decision below, the D.C. Circuit stated that *Richards* left open the question whether notice is necessary for virtual representation. Pet. App. 12a. What *Richards* said, however, was that "[e]ven assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some *class suits* adequate representation might cure a lack of notice, *but cf.* [*Hansberry*, 311 U.S.] at 40 . . . *Mullane*, [339 U.S. at 319], . . . it may not be read to permit the application of res judicata here." *Richards*, 517 U.S. at 801 (emphasis added). As the "but cf." citations demonstrate, the Court was skeptical that *Hansberry* could be so read, and rightly so: *Hansberry* itself recognized the importance of notice to due process, 311 U.S. at 40 (describing "notice and opportunity to be heard" as being "requisite to the due process which the Constitution prescribes"), and *Mullane* and its progeny confirm that notice is an "elementary and fundamental requirement." *Mullane*, 339 U.S. at 314; *see also, e.g.*, *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478,

---

[7] The need for a person to have received notice of a case (and more) if that person is to be bound by the case's judgment is underscored where, as here, the case was litigated in a forum that did not have personal jurisdiction over that person. *Cf. Shutts*, 472 U.S. at 811-12 (explaining that "absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims," but that, in the context of class actions for monetary damages, receipt of notice and the opportunity to opt out constitute "consent to jurisdiction").

484 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Greene*, 456 U.S. at 449.

In any event, the issue assumed for the sake of argument in *Richards* was not that adequate representation *in general* might sometimes replace the need for notice, but that adequate representation might replace the need for notice in some *class* suits. In class action litigation, extra protections are provided, upfront, to protect the interests of absent class members. The class representatives understand themselves to have undertaken to represent the absent class members; the court takes special care to protect the interests of the class members in the "manner suggested in *Hansberry*," *Richards*, 517 U.S. at 802; and the class certification process (including whatever notice is required in determining who is in the class) creates a legal relationship between the class representatives and absent class members under which the class representatives are accountable to the absent class members for the conduct of the litigation. *See supra* pp. 16-17 (describing class action protections). None of those factors is present here.

Outside of the class action context, when someone has a legal relationship with another person that provides that person with authority to represent him in a lawsuit, notice of the lawsuit can be imputed to the first person. *See Gonzalez*, 27 F.3d at 761 n. 11 ("[T]he formation of the underlying relationship, in and of itself, embodies what amounts to constructive notice of all ensuing litigation."); *see also Curtis, Collins & Holbrook Co. v. United States*, 262 U.S. 215, 222 (1923) ("The general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business."); Restatement (Third) of Agency § 5.03 (2006).

Here, however, Herrick and Taylor did not have the kind of relationship such that notice can be imputed to Taylor. Taylor's and Herrick's sharing an interest in aviation history, joining the same club, and knowing each other did not provide Herrick with authority to receive notice on behalf of Taylor. And the other events in their relationship contained in the record—Herrick's provision of discovery documents to Taylor, his request that Taylor help him with his aircraft, and Taylor's hiring of Herrick's lawyer—all took place *after* Herrick's litigation was over, and therefore cannot possibly establish that Taylor had the opportunity to "choose for himself whether to appear or default, acquiesce or contest" in the earlier litigation. *Mullane*, 339 U.S. at 314.

That Herrick and Taylor did not share a representational relationship under which Herrick's knowledge can be imputed to Taylor underscores the problem with deeming Taylor and Herrick's relationship sufficiently close to bind Taylor to the results of Herrick's litigation: Just as notice to Herrick does not count as notice to Taylor, Herrick's opportunity to be heard cannot count as Taylor's opportunity to be heard. Because Taylor did not have a legal relationship with Herrick under which Herrick was accountable to Taylor for the conduct of the Tenth Circuit case, Taylor was a "mere stranger" to that litigation, and Taylor cannot be bound by the Tenth Circuit's judgment.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings on the merits of petitioner's FOIA claim.

Respectfully submitted,

MICHAEL JOHN PANGIA
THE LAW OFFICES OF
MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

February 2008

RESPONDENT'S BRIEF

12

3-19-08

No. 07-371

In the Supreme Court of the United States

BRENT TAYLOR, PETITIONER

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the final judgment in litigation under the Freedom of Information Act (FOIA), in which the requester unsuccessfully sought disclosure of technical drawings for an antique aircraft that he owned, is binding in a second FOIA suit seeking the same drawings brought by a "close associate" who was asked by the first requester to help restore the plane and who utilized the same attorney and discovery from the first suit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Summary of argument 12
Argument:
I. The court of appeals correctly held that petitioner was in privity with Herrick with respect to their joint interest in obtaining disclosure under FOIA of Fairchild's technical drawings in order to restore Herrick's plane 16
A. The concept of privity is more flexible than petitioner acknowledges and does not always require legal accountability of one party to the other 19
B. Where litigants who share a common interest engage in coordinated litigation to achieve their common goal, especially one that concerns a public right, principles of privity properly bar the second suit 26
C. The lower courts properly held that, in light of Herrick and petitioner's close working relationship with respect to the FOIA litigation, the judgment in *Herrick* should be binding 34
1. Because the right of disclosure under FOIA is a public right, a more flexible standard for establishing privity is appropriate 34

Table of Contents—Continued: Page

2. In light of the "close working relationship" between petitioner and Herrick with respect to the FOIA litigation, the judgment in Herrick's suit is binding here 38

II. The court of appeals did not deprive petitioner of due process by holding that litigation of his FOIA claim was barred by the judgment against Herrick 44

Conclusion 48

TABLE OF AUTHORITIES

Cases:

Anchor Glass Container Corp. v. *Buschmeier*, 426 F.3d 872 (7th Cir. 2005) 20, 42

Bigelow v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912) 17

Blonder-Tongue Labs., Inc. v. *University of Ill. Found.*, 402 U.S. 313 (1971) 17, 19, 22

Crane v. *Commissioner of Dep't of Agric., Food & Rural Res.*, 602 F. Supp. 280 (D. Me. 1985) 25, 43

DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) ... 47

EEOC v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004), cert. denied, 546 U.S. 811 (2005) 31

EPA v. *Mink*, 410 U.S. 73 (1973) 34, 35

Eddy v. *Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), petition for cert. pending, No. 07-495 (filed Oct. 11, 2007) 30

FEC v. *Akins*, 524 U.S. 11 (1998) 34, 35

Cases—Continued: Page

Gonzalez v. *Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994) 22, 39
Gustafson v. *Johns*, 213 Fed. Appx. 872 (11th Cir. 2007) 25, 31, 42
Hale v. *Hale*, 33 N.E. 858 (Ill. 1893) 22, 23, 26
Hansberry v. *Lee*, 311 U.S. 32 (1940) 46
Headwaters Inc. v. *USFS*, 399 F.3d 1047 (9th Cir. 2005) 29
Herrick v. *Garvey*:
200 F. Supp. 2d 1321 (D. Wyo. 2000), aff'd, 298 F.3d 1184 (10th Cir. 2002) 2, 3, 4
298 F.3d 1184 (10th Cir. 2002) 2, 4
Hodgkins v. *Sansom*, 135 S.W.2d 759 (Tex. Civ. App. 1939) 46
Irwin v. *Mascott*, 370 F.3d 924 (9th Cir. 2004) 10
Jaffree v. *Wallace*, 837 F.2d 1461 (11th Cir. 1988) ... 25, 43
Jefferson Sch. of Soc. Sci. v. *Subversive Activities Control Bd.*, 331 F.2d 76 (D.C. Cir. 1963) 22
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) .. 45
Lovejoy v. *Murray*, 70 U.S. 1 (1866) 25
Martin v. *Wilks*, 490 U.S. 755 (1989) 27, 32
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 30
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 16, 45
McArthur v. *Scott*, 113 U.S. 340 (1885) 23
Montana v. *United States*, 440 U.S. 147 (1979) 16, 20, 24
Myers v. *Kim*, 55 Pa. D. & C.4th 93 (Com. Pl. 2001) 20, 42

Cases—Continued: Page

National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 34, 35
News-Press v. *United States DHS*, 489 F.3d 1173 (11th Cir. 2007) 36
Niere v. *St. Louis County*, 305 F.3d 834 (8th Cir. 2002) 31
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 9, 17, 19
Petit v. *City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991) 43
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) ... 46
Richards v. *Jefferson County*, 517 U.S. 793 (1996) ..... *passim*
Southern Pac. R.R. v. *United States*, 168 U.S. 1 (1897) 17
State ex rel. Sullivan v. *School Dist. No. 1*, 50 P.2d 252 (Mont. 1935) 28, 46
Stewart v. *Oneal*, 237 F. 897 (6th Cir. 1916), cert. denied, 243 U.S. 645 (1917) 23
Stromberg v. *Board of Educ.*, 413 N.E.2d 1184 (Ohio 1980) 30
Tice v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999) 22, 39
Town of Tallassee v. *State ex rel. Brunson*, 89 So. 514 (Ala. 1921) 30, 46
Tyus v. *Schoemehl*, 93 F.3d 449 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997) ..... *passim*
United States Dep't of Justice v. *Julian*, 486 U.S. 1 (1988) 35

Constitution, statutes, regulation and rules: Page

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 47
Art. III 34, 45, 47
Amend. V (Due Process Clause) 29, 48
Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1319(g)(6)(A)(ii) 47
Freedom of Information Act, 5 U.S.C. 552 (2000 & Supp. V 2005) 2
5 U.S.C. 552(a) (2000 & Supp. V 2005) 34
5 U.S.C. 552(a)(1)-(3) (2000 & Supp. V 2005) 34
5 U.S.C. 552(a)(2)(D) 36
5 U.S.C. 552(a)(4)(B) 22, 34, 37, 45
5 U.S.C. 552(b)(4) 2
31 U.S.C. 3730(b)(5) 47
42 U.S.C. 1983 ..... 25, 43
42 U.S.C. 2000e-2(n)(1)(B)(ii) 47
Exec. Order No. 12,600, 3 C.F.R. 235 (1988) 2
Fed. R. Civ. P.:
Rule 11 9
Rule 41 18

Miscellaneous:

Black's Law Dictionary (7th ed. 1999) 30
3 William Blackstone, *Commentaries* 47
Robert G. Bone, *Rethinking the "Day In Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193 (1992) 27

Miscellaneous—Continued: Page

Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967) 35
Restatement of Judgments (1942) 25, 39
Restatement (Second) of Judgments (1982) 13
Vol. 1 ..... 21, 24
Vol. 2 ..... 21, 23, 24, 27
18A Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 2002) 22, 23, 24, 27

In the Supreme Court of the United States

No. 07-371

BRENT TAYLOR, PETITIONER

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 490 F.3d 965. The opinion of the district court (Pet. App. 22a-36a) is not published in the Federal Supplement, but is available at 2006 WL 279103.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. The petition for a writ of certiorari was filed on September 17, 2007, and was granted on January 11, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case concerns the preclusive effect of a judgment in an action under the Freedom of Information Act

(FOIA), 5 U.S.C. 552 (2000 & Supp. V 2005), in which the requester sought disclosure of specifications for an antique aircraft that he owned, on a second FOIA suit brought by his "close associate," who was asked to help restore that plane and who utilized the same attorney and discovery from the first suit.

1. In 1997, Greg Herrick, a collector of antique aircraft, submitted a request under FOIA that the Federal Aviation Administration (FAA) make available for reproduction the certification drawings for a 1930s era F-45 aircraft. Pet. App. 24a-25a. Herrick was the owner of a 1936 F-45, one of only two surviving specimens of that vintage aircraft, and wished to obtain the certification drawings in order to restore the plane. *Ibid.*; *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321, 1322-1323 (D. Wyo. 2000), aff'd, 298 F.3d 1184 (10th Cir. 2002). The certification materials were of considerable value to Herrick's project because a plane restored to the original specifications could be certified as airworthy without the need to obtain costly engineering analyses or otherwise demonstrate the aircraft's airworthiness to the FAA. See J.A. 78-79; *Herrick*, 200 F. Supp. 2d at 1327. The drawings had been provided to the FAA's predecessor agency, the Civil Aeronautics Administration, by the plane's manufacturer, Fairchild Engine and Airplane Corporation (FEAC), as required by federal safety regulations. Pet. App. 24a & n.2.

The FAA declined to make the certification drawings public on the ground that they were exempt from FOIA's disclosure requirements. Exemption 4 of FOIA exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Pursuant to Executive Order No. 12,600,

3 C.F.R. 235 (1988), which generally requires federal agencies to give notice to providers of confidential commercial information when the agency determines that such information is responsive to a FOIA request, the FAA informed Herrick that it would disclose the drawings if he obtained the consent of Fairchild Corporation (Fairchild), the successor to FEAC. Fairchild did not give Herrick permission to obtain the materials and objected to disclosure on the ground that the certification drawings were commercially valuable trade secrets. According to Fairchild, although the plane was no longer in production, the drawings retained commercial value precisely because they would be valuable to a person, such as Herrick, who was interested in restoring a vintage aircraft to the FAA's airworthiness standards. C.A. App. A145-A146. The FAA therefore determined that, under Exemption 4, the documents were not subject to disclosure. Pet. App. 24a; *Herrick*, 200 F. Supp. 2d at 1323.

Herrick filed suit in the United States District Court for the District of Wyoming, which, after considering "[v]oluminous materials" provided by the parties and by Fairchild, granted summary judgment in favor of the FAA. *Herrick*, 200 F. Supp. 2d at 1327, 1329. The issues before the district court were whether the drawings fell within Exemption 4, whether Fairchild owned the rights to the drawings, and whether Fairchild waived any claim to protection. *Id.* at 1327-1329. The district court held that the requested drawings "are typical trade secrets customarily not available to the public," and that it did not matter for purposes of Exemption 4 that the plane was no longer in production. *Id.* at 1328. The court further determined that Fairchild was the successor to the entity that provided the drawings, *ibid.*,

and that Fairchild had not waived trade-secret protection for the drawings, *id.* at 1329. The court rejected Herrick's reliance on a 1955 letter in which Fairchild had authorized the FAA to lend out Fairchild airplane drawings. The court noted that the requested documents relating to the F-45 "have not been released previously and have not been disclosed by the FAA," and that Fairchild had "reversed its earlier authorization to disclose materials." *Ibid.*

The United States Court of Appeals for the Tenth Circuit affirmed. *Herrick* v. *Garvey*, 298 F.3d 1184 (2002). Herrick argued on appeal that Fairchild's predecessor in interest had waived any trade-secret protection in 1955 when it authorized disclosure of the drawings and that Fairchild could not rescind the waiver because it was not the proper owner of the drawings. *Id.* at 1190. Fairchild filed an amicus brief supporting the FAA's withholding decision. *Id.* at 1188. The Tenth Circuit determined that the 1955 letter did deprive the documents of trade-secret status, *id.* at 1193-1194, but rejected Herrick's argument that Fairchild was not the owner of the materials for purposes of revoking its consent to disclosure, *id.* at 1193, 1195. In so holding, the court of appeals observed, in a footnote, that it was assuming without deciding—because Herrick had not contested—that a trade secret's status as such could be restored by revoking consent before a document had been disclosed and that such a revocation could be effective even if made after a FOIA request had been lodged. *Id.* at 1194-1195 n.10.

2. Petitioner is the executive director of the Antique Aircraft Association, an association of which Herrick is a member. Petitioner is a "close associate" of Herrick's, whom Herrick had requested to help restore Herrick's

F-45. Pet. App. 2a-3a. Less than one month after the Tenth Circuit's decision in *Herrick*, and one week after the Tenth Circuit's mandate issued, petitioner filed a FOIA request for the same documents that were the subject of the *Herrick* litigation. *Ibid.* In February 2003, petitioner, represented by the same attorney who had represented Herrick, filed suit in the United States District Court for the District of Columbia. *Id.* at 3a. Petitioner's complaint referred to the Tenth Circuit's conclusion in *Herrick* that the documents had lost their "secret" status for the purposes of Exemption 4 as a result of Fairchild's letter to the FAA in 1955, and its holding against Herrick on the ground that he had failed to challenge the proposition that the information could be returned to protected status. J.A. 17. Petitioner's complaint challenged that proposition. *Ibid.* Fairchild intervened as a defendant to protect its trade-secret property interest. Pet. App. 24a n.3.

The district court litigation was stayed so that the FAA could consider petitioner's request, of which the FAA had no record. J.A. 1, 56. In his administrative papers, petitioner again claimed that, in light of the Tenth Circuit's decision, the requested material could not be considered secret. J.A. 43-44. The FAA declined to disclose the records on the ground that they are exempt as trade secrets. J.A. 45-52.

The parties returned to the district court, where petitioner filed a motion for discovery, again framing his case in terms of the *Herrick* litigation. Petitioner set forth in great detail the procedural history of *Herrick*, what the discovery from that litigation demonstrated, and what questions remained. J.A. 25-32; see J.A. 27 ("The docket-like file was obtained through discovery in the *Herrick* FOIA case."); J.A. 28 n.2 ("The plaintiff

learned of these facts also from the discovery in the FOIA case brought by Mr. Herrick."); J.A. 29 n.3 (noting that requested discovery in this case was designed to answer a question raised by "discovery of the corporation" in *Herrick*, with respect to which "[t]he plaintiff tried to subpoena" an individual in *Herrick* unsuccessfully); J.A. 35 ("The FAA files * * * were already produced in the *Herrick* case, but we do not know what has been filed since.").

Petitioner explained that his interest in obtaining the F-45 drawings stemmed from his relationship with Herrick. Petitioner noted that Herrick, who owned one of "only two of the F-45s [that] exist today," was "in the process of repairing the aircraft" and "needed the plans and specifications mainly for the tail assembly." J.A. 28. Petitioner recounted at length that this interest had given rise to Herrick's FOIA request and the unsuccessful litigation in the Tenth Circuit. J.A. 28-32. Petitioner then explained that "Herrick has now requested [petitioner] to assist him with the repair of his aircraft," and, he continued, "[i]n view of the fact that it has already been adjudicated that this material ceased being a secret in 1955, * * * [petitioner] requested that the FAA loan the material to him under the FOIA." J.A. 32; see also J.A. 27 (asserting, based on *Herrick*, that the loss of trade-secret status had "already been adjudicated"); J.A. 34 (relying on "what has been adjudicated").

At various points in petitioner's memorandum, it was unclear whether the brief was written on behalf of petitioner or Herrick. For example, after discussing the Tenth Circuit's decision, the memorandum stated that "Herrick does not agree, of course," with the Tenth Circuit's hypothesis that Fairchild could reassert its interest in the drawings' secrecy. J.A. 31. Elsewhere, the

memorandum chastised the Tenth Circuit for affirming in *Herrick*, asserting that "a remand would have been appropriate in the plaintiff's view." J.A. 32 & n.4.

3. The FAA and Fairchild each moved for summary judgment on the ground that petitioner was in privity with Herrick with respect to their interest in the F-45 drawings, and that the judgment in *Herrick* barred petitioner from relitigating the Exemption 4 issue in a second suit. The district court granted summary judgment in respondents' favor on that basis. Pet. App. 22a-36a.

The district court observed that petitioner disputed only two of the four requirements for res judicata. Pet. App. 29a. Petitioner did not contest that *Herrick* was a final judgment on the merits rendered by a court of competent jurisdiction. *Ibid.* Petitioner did dispute, however, whether there was "an identity of parties" or "an identity in the cause of action in both suits." *Ibid.* The court held that both requirements were satisfied. *Id.* at 29a-35a.

The district court first held that the claims were the same. The court observed that it was uncontested that petitioner's and Herrick's lawsuits each sought judicial review of the FAA's decision that the same F-45 drawings were subject to FOIA Exemption 4. Pet. App. 29a. The court rejected petitioner's argument that the claims were different simply because petitioner sought to challenge a legal conclusion that had been the basis of the Tenth Circuit's decision, but that Herrick had not contested. *Id.* at 29a-30a.

The court also found that petitioner and Herrick were in "privity" under a theory of "virtual representation." Pet. App. 30a-31a. Applying the analysis enunciated by the Eighth Circuit in *Tyus* v. *Schoemehl*, 93 F.3d 449, 454 (1996), cert. denied, 520 U.S. 1166 (1997),

the district court found that several factors supported that conclusion. See Pet. App. 30a-35a. The court stressed that the interests of Herrick and petitioner were identical: "preservation of the same antique aircraft." *Id.* at 32a. Although petitioner sought to distinguish his interest from that of Herrick, the court held petitioner to his earlier admission that "Herrick 'requested [petitioner] to assist him with the repair of his aircraft' and that Herrick also sought the information in his litigation because Herrick was 'in the process of repairing the aircraft.'" *Id.* at 32a-33a (quoting Pl's Mot. for Disc.); J.A. 28, 32. Considering the summary judgment record, the court stated that the evidence showed Herrick and petitioner were

> two individuals who are quite fond of antique aircrafts and the historical preservation thereof, who are members of the same antique aircraft association, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and [petitioner] has agreed to repair.

Id. at 33a (footnotes omitted). The identity of Herrick and petitioner's interests, coupled with their use of the same counsel, confirmed also that Herrick had been an adequate representative in the first suit. *Ibid.*

The court found that preclusion was especially warranted in light of the fact that Herrick's and petitioner's suits concerned "public law issues" as to which the number of potential plaintiffs was effectively limitless. Pet. App. 34a (quoting *Tyus*, 93 F.3d at 456). In such cases, where a victory by either plaintiff would equally benefit each, failure to apply preclusion would encourage

"fence-sitting" and bringing repetitious claims until one is successful. *Id.* at 34a-35a. The court concluded that the facts of this case illustrated precisely such "deliberate maneuvering." *Id.* at 35a. It noted that "Herrick shared his discovery materials with [petitioner]," and that petitioner had, just a month after the judgment in Herrick's case, tried to pick up where Herrick left off by pursuing an "issue that his own lawyer failed to raise on appeal in Herrick's case." *Id.* at 33a n.6, 34a, 35a.

The district court was so convinced that petitioner's case was "one of deliberate maneuvering to avoid the effects of * * * Herrick's abortive litigation" that he directed petitioner and his counsel to show cause why sanctions should not be imposed upon them under Federal Rule of Civil Procedure 11. Pet. App. 35a-36a. Although the court ultimately decided against imposing sanctions, it admonished counsel that he had come to the "doorstep" of sanctionable behavior. J.A. 95.

3. Petitioner appealed, and the court of appeals unanimously affirmed the holding that res judicata bars this second lawsuit by Herrick's privy. Pet. App. 1a-21a. The court recognized that the doctrine of res judicata requires a balance between "the nonparty's right to due process," *id.* at 8a, and the "deep-rooted historic tradition that everyone should have his own day in court" on the one hand, *ibid.* (quoting *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996)), and the "burden of relitigation," the "possibility of inconsistent results," and the "public interest in judicial economy" on the other, *ibid.* (citing *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979)).

The court held that two necessary, but not sufficient, preconditions must be met before a court could find a second lawsuit barred under the doctrine of virtual rep-

resentation. There must be both an "identity of interests" and "adequate representation." Pet. App. 8a. In addition, the court concluded there must be at least one of the following factors showing "an affirmative link between the later litigant and either the prior party or the prior case": "[1] a close relationship between the present party and his putative representative, or [2] substantial participation by the present party in the first case, or [3] tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.* at 8a-9a (citing *Irwin* v. *Mascott*, 370 F.3d 924, 929-930 (9th Cir. 2004)).

The court found each of the necessary prerequisites to be satisfied. Petitioner and Herrick not only "wanted the same result but * * * had substantially the same incentive to achieve it." Pet. App. 9a. The court stressed that petitioner's admission, "that Herrick had asked him to assist with the restoration of Herrick's F-45," demonstrated that "Herrick and [petitioner] had the same motivation to obtain the documents, viz., the restoration of Herrick's F-45." *Id.* at 10a.[1]

The court also held that there had been adequate representation of that common interest in Herrick's lawsuit. Pet. App. 11a-14a. The court declined to treat the presence or absence of notice to petitioner of the prior litigation as dispositive of the representation question, while noting its importance as a consideration. *Id.* at 13a. Here, although the present record was insufficient

---

[1] The court of appeals noted that the affidavit petitioner had filed in the district court in connection with his motion to reconsider took issue only with the district court's characterization, Pet. App. 32a-33a, that he had an "*agreement* with Herrick to restore his F-45," but conspicuously did not disavow petitioner's earlier admission that Herrick had "*asked* for his assistance," *id.* at 11a n.* (emphases added).

to show that petitioner had notice of Herrick's litigation at the time it was ongoing, the court found that other indicia sufficiently demonstrated adequate representation. The court first determined that "Herrick had an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than [petitioner's]." *Id.* at 14a. In addition, the court observed that "Herrick and [petitioner] used the same attorney to pursue their FOIA claims," a fact that was not itself dispositive, but "in combination with an identity of interest" was "surely relevant." *Ibid.*

The court then held that petitioner and Herrick had "a close working relationship relative to the[ir] successive cases." Pet. App. 17a. The court rejected the notion "that only a legal relationship may qualify as a 'close relationship.'" *Ibid.* Rather, the court held, "[w]hether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question." *Ibid.* In this case, the court found that a sufficiently close relationship was established by the fact that

> Herrick and [petitioner] were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well: Herrick asked [petitioner] to assist him in restoring his F45, provided information to [petitioner] that Herrick had obtained through discovery, and at summary judgment [petitioner] did not oppose Fairchild's characterization of Herrick as his "close associate."

Ibid.

Additionally, the court noted that there was some evidence of the type of tactical maneuvering that could

be "probative of collusion or otherwise indicative of privity." Pet. App. 16a. Specifically, the court observed that petitioner filed his case "on the heels of" the Tenth Circuit's *Herrick* decision, "with the assistance of the losing party to the prior litigation," which "suggests Herrick and [petitioner] coordinated the filing of [petitioner's] request" and litigation "so that [petitioner] could try where Herrick had failed, to the benefit of both." *Id.* at 16a-17a. Because, however, the court considered there to be some "ambiguity of the facts" as to whether petitioner and Herrick were "in cahoots," and because it was unnecessary to the result, the court did not decide whether the facts constituted tactical maneuvering. *Id.* at 17a.

The court of appeals emphasized the narrow, fact-bound nature of its holding. The court specifically rejected the contention that its holding would preclude distinct FOIA requests by "reporters, public interest organizations, and academics" who might have "similar interests." Pet. App. 17a.

After further determining that *Herrick* was a final judgment on the merits, Pet. App. 18a-19a, and that there was an identity of claims, *id.* at 19a-20a, the court held that, under principles of res judicata, the judgment in *Herrick* barred petitioner's successive lawsuit, *id.* at 21a.

SUMMARY OF ARGUMENT

I. A. The doctrines of res judicata and collateral estoppel, and the related concept of "privity," serve a critical function in the rule of law. Without them, no resolution of disputes could be final, and litigants and the courts would always be subject to vexatious relitigation by disappointed parties or their proxies. The

history of res judicata generally and of privity more specifically has been one of gradual evolution. The few rigid rules of the early common law have given way to the general principles, numerous context-specific rules, and equitable balancing of multiple factors identified in the Restatement (Second) of Judgments. More recently, courts have recognized that to say that two persons are in "privity" is essentially to state a conclusion, and that whether a prior judgment should preclude subsequent litigation by another party is ultimately a determination of what equity, fairness, and concern for preserving judicial resources require in light of the realities of the parties' relationship with respect to the litigation.

Petitioner proceeds as though that evolution, which is evident as well in other principles of res judicata, such as the gradual abandonment of the requirement of mutuality, never happened. He contends (Br. 19) that the doctrine of privity can be summarized in a single test: whether, at the time of the first suit, there existed "a legal relationship under which the party [was] legally accountable to the non-party for the conduct of the litigation." That rule, which in practical application would be limited to the historical examples of guardians and trustees, cannot account for the wide variety of circumstances in which the courts, through the time-tested process of common law development, have recognized that the judgment in one suit should preclude relitigation in another.

B. Petitioner rests his argument in favor of a strict test for privity on statements by this Court regarding the importance of an individual's right not to be deprived of his property—which can include a claim for judicial relief—without the opportunity to be heard. But those cases concerned the question when a court can

deprive an individual of valuable private rights as a consequence of litigation as to which the individual was a *stranger*. Where a non-party has a special relationship with a party to litigation, the existence of other factors (short of petitioner's wooden "legally accountable" test) can justify the application of preclusion. If the rule were otherwise, there would be too strong a temptation for disappointed litigants to engage in tactical maneuvering to enable them to get multiple bites at the apple. One factor that especially weighs in favor of a more flexible standard for assessing privity is whether the right at stake is a public right. In that situation, the litigant's individual interest is by definition less directly affected. At the same time, the opportunity for harassment and the imposition of burdensome relitigation on the defendant is increased, because the number of potential plaintiffs may be almost limitless. Moreover, in private litigation a party must plead a relationship to the disputed matter that can reveal a degree of privity just to establish standing. It makes little sense to allow a FOIA litigant to avoid a traditional showing of standing, but then benefit from strict privity requirements that developed in the private context.

C. The courts below carefully considered the relationship between the parties with respect to the litigation and the nature of the interests at stake in determining that it would be fair and equitable to hold petitioner bound to the outcome of the litigation brought by his close associate, Herrick.

Petitioner's attempt to force public right litigation such as FOIA into categories developed for private litigation would, if successful, mean that for all practical purposes the government could never obtain a final judgment in its favor in FOIA cases. Because every

member of the public has standing to seek disclosure under FOIA, potential plaintiffs would never have to demonstrate the kind of personal interest in obtaining the information that would confirm the extent of their relationship to an earlier litigant. Thus, as long as they avoided establishing a formal agency relationship, an unsuccessful litigant could always find another person to bring a further FOIA action as his proxy. Where, as here, the request concerns information that is the alleged property of a third-party, that party too would face the prospect of never-ending litigation.

In this case, Herrick and petitioner shared not just a common or parallel interest in disclosure under FOIA; they had a joint interest that derived from a single, very specific goal: to restore Herrick's antique aircraft. Herrick, the owner of the aircraft, wanted to obtain the technical drawings of the plane in order to facilitate its restoration. Petitioner, whom Herrick had asked to help work on the plane, had not only the same goal of obtaining the technical drawings, but the same motivation: their common project to restore Herrick's plane. Petitioner's interest (and lawsuit) was thus entirely derivative of Herrick's.

The conduct of petitioner's suit reflects the extent to which it was, in practical reality, a continuation of Herrick's FOIA action. Petitioner initiated his FOIA request within a month of Herrick's loss, using the same lawyer, and taking up where Herrick's case left off. Petitioner treated the issues on which Herrick had prevailed as having been "adjudicated," and turned his attention to the issue decided adversely to Herrick. His papers referred freely to the litigation history of *Herrick*, built upon the discovery obtained in that suit, and even, at times, seemingly lost track of whether peti-

tioner or Herrick was the plaintiff in the second suit. The record thus amply supports the court of appeals' conclusion that petitioner and Herrick had "a close working relationship relative to the[ir] successive cases." Pet. App. 17a. This is precisely the type of circumstance in which fairness and equity dictate that the two associates should be held to a single adjudication.

II. Finally, petitioner's appeal to due process fails. Because a member of the public has only an indirect interest in the vindication of a public right, his right to litigate the issue personally has little, if any, weight with respect to the due process balancing analysis under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). In most circumstances, a member of the public has no standing to bring such a claim in the first place. And in some situations where standing is recognized, the judgment in the first suit seeking to vindicate the right binds all. Here, the court of appeals held that petitioner should be bound by the judgment in *Herrick* in light of the significant relationship he had to that litigation. That judgment does not remotely offend due process.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER WAS IN PRIVITY WITH HERRICK WITH RESPECT TO THEIR JOINT INTEREST IN OBTAINING DISCLOSURE UNDER FOIA OF FAIRCHILD'S TECHNICAL DRAWINGS IN ORDER TO RESTORE HERRICK'S PLANE

It is a "fundamental precept of common-law adjudication" that a right "determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana* v. *United States*, 440 U.S. 147, 153 (1979)

(quoting *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48 (1897)). Thus, under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Ibid.* As the Court has recognized, the doctrine of res judicata serves several important interests. It "protects * * * adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-154. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979) (preclusion serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation"); *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 328-329 (1971) (*Blonder-Tongue*) (noting the "misallocation of resources," both for "judicial administration" and parties, that results from relitigation).

Consistent with the significant public purposes that underlie the doctrine, the Court has been mindful of the need to craft rules of preclusion that discourage gamesmanship, so that "repeated litigation" does not take on "the aura of the gaming table," *Blonder-Tongue*, 402 U.S. at 329, with an unsuccessful litigant trying over and over until his luck changes. To that end, the courts have long recognized that "a judgment not only estops those who are actually parties, but also such persons as were represented by those who were or claim under or in privity with them." *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 128 (1912). Were it otherwise, a party could seek to relitigate an adverse outcome by having his privy bring a second suit.

Concerns regarding coordinated serial litigation are particularly acute in public law cases, where "the number of plaintiffs with standing is potentially limitless." *Tyus* v. *Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997). In that circumstance, because a win by any particular plaintiff benefits all equally, the courts must take care that the rules of preclusion not "encourage fence-sitting." *Ibid.* Otherwise, "various members of a coordinated group [could] bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group," including those who had previously litigated and lost. *Id.* at 457. Thus, as this Court has recognized, "the States have wide latitude to establish procedures * * * to limit the number of judicial proceedings" that can be brought to assert such public rights. *Richards* v. *Jefferson County*, 517 U.S. 793, 803 (1996).[2]

The court of appeals' decision in this case draws a careful line that prevents abusive and repetitious FOIA litigation, while protecting the interest of truly independent requesters in separately litigating their claims. Where records of broad and genuine public concern are at issue, there may be multiple, independent requesters, each of whom, under the court of appeals' test, could seek judicial review of a determination to withhold the

---

[2] Although the issue here arises in the context of res judicata and a prior judgment, courts would have comparable authority to address similar efforts at earlier steps of the litigation. For example, an effort to bring and dismiss serial lawsuits by different plaintiffs in order to secure a judge perceived to be friendly would not be allowed to circumvent Rule 41. In public law contexts where multiple plaintiffs have standing, such as FOIA or redistricting, it would be possible to locate numerous plaintiffs with standing, but such an effort at judge shopping would surely be policed by an expansive notion of privity. There is no reason not to adopt a similar solution to the problem here.

documents. On the other hand, where, as here, a single individual seeks records of little public interest on account of their peculiar commercial value to that individual, the court of appeals' decision will prevent that individual from relitigating an adverse judgment, in concert with friends and family whose only interest in the issue is derivative, in judicial districts across the country. Under petitioner's argument, such litigation do-overs could never be barred as long as the initial requester each time enlisted a new proxy who had no notice of the prior lawsuits at the time they were pending. Not surprisingly, the doctrine of res judicata does not compel such a result and places a greater value on judicial and governmental resources.

A. The Concept Of Privity Is More Flexible Than Petitioner Acknowledges And Does Not Always Require Legal Accountability Of One Party To The Other

Because principles of preclusion are judicially crafted, they have been revised and refined through the years to further their principal purposes. In *Blonder-Tongue*, for example, the Court recognized that "the court-produced doctrine of mutuality of estoppel [was] undergoing fundamental change in the common-law tradition." 402 U.S. at 327. In that case, the Court abandoned mutuality as a requirement for defensive collateral estoppel against a patentee whose patent had already been declared invalid. *Id.* at 314-315, 328-330, 350. Eight years later, in *Parklane Hosiery*, the Court likewise did away with the categorical rule against offensive nonmutual collateral estoppel, adopting in its place a rule that granted the district courts "broad discretion" as to when estoppel should be recognized in such circumstances. 439 U.S. at 331.

In *Richards*, this Court recognized that the concept of "privity" has likewise evolved from its original narrow origins. The Court noted well-established applications of "privity," such as that a judgment involving "a guardian or trustee may also bind the ward or the beneficiaries of a trust." 517 U.S. at 798. "Moreover," the Court continued, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Ibid.* The term "privies" has, in fact, been largely abandoned in favor of a more substantive analysis of the types of relationships that give rise to preclusion. See *Montana*, 440 U.S. at 154 n.5. Thus, courts have recognized that the term "privity," while constrained by "constitutional limits," *Richards*, 517 U.S. at 798, "should be flexible enough to acknowledge the realities of the parties' relationships," *Anchor Glass Container Corp.* v. *Buschmeier*, 426 F.3d 872, 879 (7th Cir. 2005) (quoting *Myers* v. *Kim*, 55 Pa. D. & C.4th 93, 101 (Com. Pl. 2001)). The question in this case, then, is whether "the realities of the parties' relationships," *ibid.*, is such that they warrant recognition that the parties are in privity for purposes of their FOIA litigation.

Petitioner maintains that the answer to that question is governed by a categorical rule: there must be "a legal relationship under which the party is legally accountable to the non-party for the conduct of the litigation," Pet. Br. 19, and "the relationship of legal accountability between the party and non-party must exist at the time of the [first] case for the case's judgment to bind the non-party in later cases," *id.* at 14. Petitioner's proposal to define the scope of privity according to narrow (and easily avoidable) legal technicalities cannot be squared with the significant development in the doctrine of privity

that has transpired over the past century or with *Richards*, which specifically embraced that expansion. Petitioner cites, as an example of the requisite legal relationship, "the relationship between a guardian and ward," *ibid.*, but *Richards* specifically cited guardians and trustees as "example[s]" of traditional privity and *then* noted that, "[*m*]*oreover*," the term is "now used" to describe relationships "that would not have come within the traditional definition," 517 U.S. at 798 (emphasis added) (citing 1 Restatement (Second) of Judgments ch. 4, §§ 34 *et seq.* (1982) (Restatement (Second)); 2 *id.* ch. 4, §§ 43 *et seq.*). Thus, it is clear that the Court understood that the more modern application of privity goes beyond relationships such as guardian and ward or trustee and beneficiary, the only ones that petitioner's rule encompasses. The relationship between the owner of an airplane and a person whose derivative interest flows from an intent to restore the very same airplane surely is a strong candidate for inclusion.[3]

While a legal relationship such as that between guardian and ward is one circumstance in which preclusion may apply, the Restatement (Second), which *Richards* embraced, and numerous judicial decisions, including of this Court, demonstrate that such a relationship is not a *necessary* precondition to preclusion in every case. Because "[p]rivity is an 'elusive concept, without any precise definition of general applicability,'" Pet.

---

[3] The brief of amici Eddy and Lander (at 15) inverts *Richards*' discussion of these points and thereby gives an inaccurate impression of the Court's analysis. By first quoting *Richards*' recognition of an expanded use of the term "privity" and then the Court's "example" of a guardian or trustee, *ibid.*, amici's treatment of *Richards* could give the mistaken impression that *Richards* gave guardians and trustees as examples of the *more expansive* application that the Court recognized.

App. 5a (quoting *Jefferson Sch. of Soc. Sci.* v. *Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963)), "there is no clear test for determining" its application, *Tyus*, 93 F.3d at 455. The courts engage in an "equitable and fact-intensive" inquiry, *ibid.*, "on a case-by-case basis," *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994), in order to answer "the real (fact-specific) question" whether there was "the kind of link between the earlier and later plaintiffs that justifies binding the second group to the result reached against the first," *Tice* v. *American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999). A finding that parties are in privity often "simply expresses a conclusion that preclusion is proper," given the particular facts and circumstances of the parties' relationship with respect to the litigation. 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4449, at 351 (2d ed. 2002) (*Federal Practice and Procedure*). The determination is ultimately one that calls upon "the trial courts' sense of justice and equity." *Blonder-Tongue*, 402 U.S. at 334. That considerations of equity should come to bear is all the more appropriate where, as here, the party who seeks to avoid preclusion comes seeking equitable relief from the court. See 5 U.S.C. 552(a)(4)(B).

In the area of trusts and estates, preclusion has long been recognized in certain situations in which the party to the first litigation was not legally accountable to the party in the second suit. In the nineteenth century, the "doctrine of representation" was already a "well-recognized exception[]" to the general rule that a decree in equity will not bind the interests of parties not before the court. *Hale* v. *Hale*, 33 N.E. 858, 867 (Ill. 1893). Under that doctrine, where the absent parties and those

before the court "have one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any," the "decree may be held to be binding upon" the absent parties. *Ibid.*; see 18A *Federal Practice and Procedure* § 4461, at 653 ("in the special circumstances that make it proper for a beneficiary to enforce trust interests, it is appropriate to bind the trustee and to bind other beneficiaries as well in the absence of conflicting interests"); *McArthur* v. *Scott*, 113 U.S. 340, 404 (1885) (recognizing the doctrine of "constructive and virtual representation," but holding it inapplicable on the facts of the case).[4] Preclusion in the situation of co-beneficiaries does not, contrary to petitioner's proposed rule, stem from "any fiduciary relation," but from the exact identity of their interests and the necessity of the circumstance. *Stewart* v. *Oneal*, 237 F. 897, 903 (6th Cir. 1916), cert. denied, 243 U.S. 645 (1917).

The courts have similarly recognized the appropriateness of preclusion when two parties, such as family members, may each claim for the same personal injury, and a judgment has been rendered in an action by one. See 2 Restatement (Second) § 48(1), at 27. That rule applies where, for example, a parent or spouse pays for the medical expenses of a child or spouse, and the law permits either the injured party or the person who paid

---

[4] In *McArthur*, it was "apparent that there was no real representation of the interests of" the unborn grandchildren of the decedent. 113 U.S. at 404. The living grandchildren, who were alleged to have been representative beneficiaries, had themselves been represented by their parents, acting as guardians ad litem, although the parents' own interests were adverse to their children's. *Id.* at 394. The effect was that those "whose interest it was to set aside the will, in fact controlled both sides of the controversy." *Ibid.*

the expenses to sue to recover for the loss. A suit by either of them bars a second action by the other to recover those expenses. *Ibid.* "In such a situation, an 'eligible' claimant having a substantial identity of interest with the other claimant has had his day in court and can be regarded as having been the representative of the other potential claimant." *Id.* § 48(1), cmt. b, at 29. See 18A *Federal Practice and Procedure* § 4459, at 614. If the rule were otherwise, the incentive would be for spouses to split their claims, since recovery in either suit would, in most cases, be of equal value to the family finances. 2 Restatement (Second) § 48, cmt. a, at 32 (noting that such claims could be "successively attributed to different members of the family, and thus made the subject of successive attempts at their recovery").

In other instances, the courts recognize that preclusion may appropriately be applied based not on any particular relationship between the parties, but on their conduct with respect to litigation that is of common interest to them. This Court's decision in *Montana* v. *United States*, *supra*, reflects that courts will apply preclusion, without a showing of legal accountability between the parties, where a non-party "substantially participates in control" of the first litigation. 1 Restatement (Second) § 39, at 382. In *Montana*, the Court held that a state court judgment against a government contractor upholding the constitutionality of a tax on public contractors was binding upon the United States in a subsequent suit by the government on the ground that the United States had exercised "a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." 440 U.S. at 155. The Court did not find that the contractor owed a legal duty to represent the United States' interests in the first litigation.

Nor, contrary to petitioner's suggestion, did the Court rely on a determination that the United States "had a *right* * * * to control the proceedings." Pet. Br. 26 (emphasis added) (quoting *Lovejoy* v. *Murray*, 70 U.S. 1, 19 (1866)). The Court instead relied on the practical reality of the situation—that the United States had, in fact, exercised such control and therefore should not have a second bite at the apple.

Other courts likewise have upheld preclusion in the situation analogous to *Montana*, but where the party who lost the *first* case seeks to litigate a second time, through a proxy. See Restatement of Judgments § 85(2), at 402-403 (1942) (noting that preclusion applies where the second of two lawsuits is litigated on "account" of a party to the first). Where, for example, an association of milk producers lost its challenge to a federal regulation, and then financed a new suit by a nonmember plaintiff to advance their common claim, the district court denied a preliminary injunction on the ground that the suit was likely barred by res judicata. *Crane* v. *Commissioner of Dep't of Agric., Food & Rural Res.*, 602 F. Supp. 280 (D. Me. 1985). Similarly, where a father had brought suit under 42 U.S.C. 1983 on behalf of three of his children to challenge the prevalence of religion in the public schools, the judgment in the first case was held to bar a second suit brought by him (as counsel) on behalf of the same plaintiffs in addition to the children's mother and two more siblings to challenge the same activities, where court filings "demonstrated the inextricable linkage between" the two actions. *Jaffree* v. *Wallace*, 837 F.2d 1461, 1463, 1467-1469 & n.19 (11th Cir. 1988). See *Gustafson* v. *Johns*, 213 Fed. Appx. 872, 874, 877 (11th Cir. 2007) (per curiam) (judgment in action challenging constitutionality of redistrict-

ing held binding in second litigation where members of the committee coordinating litigation on behalf of a political party were the "driving forces" behind both suits, including recruiting the second plaintiffs, raising funds, and making litigation decisions). In all those cases, the courts correctly perceived that the second suit was derivative of the first and so could not be pursued as if the first suit never happened.

As the above discussion demonstrates, the common law doctrines of res judicata and collateral estoppel have developed in a manner that allows them to respond to the realities of litigation. That discussion further demonstrates that the common law recognizes preclusion in a variety of circumstances beyond petitioner's proposed categorical rule (Pet. Br. 14) that preclusion should apply only where there is "a legal relationship under which the party is accountable to the non-party for the conduct of the litigation."

B. Where Litigants Who Share A Common Interest Engage In Coordinated Litigation To Achieve Their Common Goal, Especially One That Concerns A Public Right, Principles of Privity Properly Bar The Second Suit

Where multiple individuals share "one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any," *Hale*, 33 N.E. at 867, the identity of interests and heightened threat of repetitive litigation make it appropriate to apply a more flexible standard for finding privity. Where those interests have been adequately represented in one litigation, the parties should not be permitted to engage in coordinated relitigation of the issue in successive suits. The "doctrine of representation" among co-beneficiaries, *ibid.*,

and the rule regarding alternative claims among family members,[5] reflect rules of preclusion that the courts have developed for such circumstances in the private law context. Yet, as numerous courts and commentators have recognized, preclusion on those grounds "is more readily found in public law cases," which affect individual interests only indirectly. 18A *Federal Practice and Procedure* § 4457, at 548.[6] In such circumstances, each individual's interest is reduced, whereas the threat of vexatious relitigation is heightened due to the large number of potential claimants. *Ibid.* Preclusion is appropriately applied in such cases where a party to one suit and a nonparty collaborate to bring a second action.

1. Where numerous individuals seek to vindicate a public right through coordinated successive litigation, it is appropriate to hold them each to the judgment in the first suit. In *Richards*, this Court made clear that, where private rights are at stake, the mere fact that one's interests have been adequately represented in earlier litigation is not a sufficient basis for applying preclusion against a non-party who was a "mere 'stranger[]'" to the first suit, 517 U.S. at 802, 803 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)). But where there is a special relationship between the parties, such as when they seek collaboratively to avoid the effects of an adverse judgment, they are not "mere 'strangers,'" *ibid.* (quoting *Wilks*, 490 U.S. at 762), and

---

[5] See 2 Restatement (Second) § 48(1), at 27.

[6] See Robert G. Bone, *Rethinking the "Day In Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 229 (1992) (although "controversial," "[p]reclusion can seem quite attractive in public law cases * * * especially if there is no reason to doubt the vigor of advocacy in the first suit").

preclusion is appropriate, especially where the rights at issue are public in nature.

"Concerns of judicial economy and cost to defendants * * * are particularly important" in the public law context. *Tyus*, 93 F.3d at 456. Because, in that context, "if the plaintiff wins, by definition everyone benefits," the risk of repetitive litigation is heightened, and the asymmetry of results creates special concerns. *Ibid.* "Holding preclusion inapplicable in this context would encourage fence-sitting, because nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost." *Ibid.* In the absence of preclusion, a would-be plaintiff is encouraged to wait, and bring a second lawsuit if the first is unsuccessful. Moreover, just as the non-party would benefit in a public law context from another's win in the first suit, the losing plaintiff in the first litigation will benefit equally with all others from a win in a second or subsequent suit. Thus, an unsuccessful litigant has an incentive to try again, using another plaintiff as his proxy. Because "the number of plaintiffs with standing is potentially limitless" in public right cases, *ibid.*, a coordinated group of plaintiffs could engage in a never-ending stream of litigation. One member of the public could litigate his claim to the highest court, "and then his next door neighbor in the same paving district might bring a similar suit, go through the same formula, and so on, until all the inhabitants of that district had their turn in court." *State ex rel. Sullivan* v. *School Dist. No. 1*, 50 P.2d 252, 253 (Mont. 1935).

At the same time that the threat of vexatious litigation is heightened in cases concerning a public right, the individual plaintiff's interest in controlling the litigation is reduced precisely because of the public nature of the right at issue. The Court recognized as much in *Rich-*

ards, which involved successive suits by different taxpayers challenging the constitutionality of a county tax. The county argued that "in cases raising a public issue of this kind, the people may properly be regarded as the real party in interest and thus that [the second set of taxpayers] received all the process they were due in the [first] action." 517 U.S. at 803. In response, the Court "distinguish[ed] between two types of actions brought by taxpayers." *Ibid.* The type involved in *Richards* presented "a federal constitutional challenge to a State's attempt to levy personal funds." *Ibid.* With respect to such a claim, concerning the litigant's own property, "the State may not deprive individual litigants of their own day in court." *Ibid.* The other category consisted of those cases "in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests." *Ibid.* (citation omitted). As to that category, the Court "assume[d] that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Ibid.*[7]

Petitioner contends to the contrary (Pet. Br. 30) that *Richards* established the opposite rule—that "there is no * * * public-law relaxation of the rules of privity." He bases that conclusion on his assertion (*ibid.*) that "*Richards* itself was a 'public-law' case: a constitutional challenge to a county tax." See *Headwaters Inc.* v.

---

[7] As we demonstrate below, see pp. 44-48, *infra*, with respect to suits to vindicate public rights, the United States or a State may, consistent with the Due Process Clause, make a single suit on behalf of the public binding as to all. The doctrine of preclusion crafted by the court of appeals is far more limited in scope.

USFS, 399 F.3d 1047 (9th Cir. 2005) (same). But petitioner's use of the phrase "public-law" is very different from *Richards*'. Petitioner relies on a definition of the phrase as encompassing any suit within the general "body of law dealing with the relations between private individuals and the government." Pet. Br. 30 (quoting *Black's Law Dictionary* 1244 (7th ed. 1999)). *Richards*, on the other hand, used the term "public" actions more narrowly, to mean litigation that has "only an indirect impact on [the litigant's] interests." 517 U.S. at 803. Thus, *Richards* cited a taxpayer suit "alleg[ing] misuse of public funds," *ibid.* (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 486-489 (1923)), an action challenging the dissolution of a school district, *ibid.* (citing *Stromberg* v. *Board of Educ.*, 413 N.E.2d 1184 (Ohio 1980)), and a citizen suit in the nature of *quo warranto* seeking the dissolution of a corporate municipality, *ibid.* (citing *Town of Tallassee* v. *State ex rel. Brunson*, 89 So. 514 (Ala. 1921) (*Tallassee*)). The Court distinguished such suits, in which the plaintiff "merely acts for and on behalf of the public generally," from those that "seek the assertion or protection of any private right." *Tallassee*, 89 So. at 516; see *Richards*, 517 U.S. at 803 (citing distinction in *Tallassee* between "public" and "private" actions). The tax claim in *Richards* was, the Court made clear, of the "private" sort, as it concerned the "State's attempt to levy *personal funds*." *Ibid.* (emphasis added).[8]

---

[8] The rights at issue in the suit brought by amici Eddy and Lander, *Eddy* v. *Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), petition for cert. pending, No. 07-495 (filed Oct. 11, 2007), would also qualify as "private" rights under *Richards* rubric. *Eddy* is a civil rights case alleging that the defendant restaurant discriminated against the plaintiffs in providing public accommodations. Their individual claims

2. For the reasons just discussed, many lower courts, including the district court in this case, have distinguished, for purposes of finding privity, between suits that involve individualized claims and those in which "the plaintiff alleges a right shared in common with the public." Pet. App. 34a (citing *Tyus*, 93 F.3d at 457). See also *Richards*, 517 U.S. at 803; *Gustafson*, 213 Fed. Appx. at 876; *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1289 (11th Cir. 2004), cert. denied, 546 U.S. 811 (2005); *Niere* v. *St. Louis County*, 305 F.3d 834, 837-838 (8th Cir. 2002). When public rights are at issue, preclusion is appropriate if there is (1) an "identity of interests" between the party sought to be precluded and the party to the prior litigation, (2) "adequate representation" of that interest in the earlier suit, and (3) some special relationship suggesting coordination between the present party and the prior party with respect to the litigation. Pet. App. 7a-8a; *Tyus*, 93 F.3d at 455.[9]

Those factors ensure that preclusion is applied only where it is fair to the party against whom it is applied and in circumstances that further the underlying pur-

---

for damages, which are not shared by members of the public generally, qualify as "private" for purposes of *Richards*' distinction.

[9] Although the court of appeals did not expressly address the significance of the fact that this case involves a public right, the court's opinion makes repeated reference to the fact that the claims at issue here were for disclosure under FOIA, and specifically notes that, under FOIA, "every individual has the right to receive nonexempt government information." Pet. App. 17a. Likewise, the court specifically noted that the right at issue was one that allowed petitioner to "try where Herrick had failed, to the benefit of both." *Ibid.* In any event, the public nature of the rights at issue were central to the district court's reasoning, *id.* at 34a-35a, and to the government's arguments on appeal, Gov't C.A. Br. 24-27, and thus are preserved for consideration by this Court.

poses of res judicata and collateral estoppel. As *Wilks* observed, this Court has recognized the preclusive effect of litigation, even as to "the rights of strangers," in certain circumstances where the stranger's interests were "adequately represented by someone with the same interests who is a party." 490 U.S. at 762 & n.2. The test applied by the court of appeals in this case requires not only identity of interests and adequate representation, but also evidence of a connection between the former and present parties with respect to the litigation, which ensures that preclusion under the court of appeals' rule applies only to those who are *not* "strangers." *Id.* at 762. The parties to the present and former litigation must not only seek "the same result," they must have "substantially the same incentive to achieve it." Pet. App. 9a. Moreover, and critically, there must be "an affirmative link between the later litigant and either the prior party or the prior case," such as "a close working relationship relative to the[] successive cases," "substantial participation by the present party in the first case," or "tactical maneuvering" to avoid the preclusive effect of the prior judgment. *Id.* at 8a-9a, 17a.

Petitioner contends that even those who satisfy the court of appeals' test are "strangers" for purposes of preclusion doctrines. According to petitioner, (1) only a "legal relationship under which the party was accountable to the non-party for the conduct of the [first] litigation" could be a sufficiently close association, Pet. Br. 21, (2) only bringing a second suit as the "undisclosed agent[]" of the first litigant could qualify as tactical maneuvering, *id.* at 23 n.4, and (3) only "control" over the initial litigation could warrant preclusion on the ground of substantial participation, *id.* at 27. But petitioner's narrow construction of what constitutes privity is incon-

sistent with the wide variety of circumstances, described above, in which privity is recognized in the absence of a "legal relationship" or "agency" in any technical sense. In particular, it ignores the potential for abuse when the second litigation is derivative of the earlier litigation, as is the case here. Nor does it recognize the significant differences between litigation involving public and private rights. Rather, as noted, petitioner stakes his argument on the assertion that "there is no * * * public-law relaxation of the rules of privity." *Id.* at 30.

As discussed above, however, see pp. 28-31, *supra*, the courts *have* recognized a public-law relaxation, and for good reason. The traditional requirements to show standing in private litigation themselves expose and weed out efforts at duplicative litigation. In most private law contexts, a second plaintiff might well have to show some legal relationship with the first litigant in order to establish standing to bring a second suit. In a case like this, for example, it would have to be clear that petitioner's interest in the litigation flowed from an agreement to restore Herrick's airplane, which in turn would establish a relationship sufficient for privity. By pleading sufficient facts to show standing, petitioner would plead himself out of court. In the public law context, however, because each citizen has standing to sue, a friend or associate can serve as proxy in a further round of litigation without needing first to establish any legal relationship with the initial party. Courts can develop rules for privity in the public-law context that are sufficiently flexible to eliminate suits that would be barred in an analogous private-law suit.

C. The Lower Courts Properly Held That, In Light Of Herrick And Petitioner's Close Working Relationship With Respect To The FOIA Litigation, The Judgment In *Herrick* Should Be Binding

1. Because the right of disclosure under FOIA is a public right, a more flexible standard for establishing privity is appropriate

Petitioner contends (Pet. Br. 30-32) that a requester's right to seek documents under FOIA is an "*individual* right[]" and that his claim is a private law claim under *Richards*' public/private dichotomy. That assertion does not withstand scrutiny. Unlike the plaintiff's right in *Richards* to hold onto his money, 517 U.S. at 803, the information that a FOIA litigant seeks to have disclosed "belongs to [the] citizens," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004). Although a person denied records is deemed to have suffered a sufficient personal injury to satisfy Article III standing, see 5 U.S.C. 552(a)(4)(B); cf. *FEC* v. *Akins*, 524 U.S. 11, 21 (1998), it is clear that the duty to disclose under FOIA is owed to the public generally. FOIA states "that official information shall be made available 'to the public.'" *EPA* v. *Mink*, 410 U.S. 73, 79 (1973) (quoting 5 U.S.C. 552(a)).[10] Thus, this Court has recognized that the statute "create[s] a judicially enforceable *public right* to secure such information." *Id.* at 80 (emphasis added). Consistent with the statute's

---

[10] Section 552(a) provides that "[e]ach agency shall make available to the public information as follows": (1) publication of certain materials in the Federal Register, (2) making certain other materials available for inspection and copying or by computer telecommunications, or (3) in response to an individual request, as in this case. See 5 U.S.C. 552(a)(1)-(3) (2000 & Supp. V 2005).

"public" character, "disclosure does not depend on the identity of the requester." *Favish*, 541 U.S. at 172. "Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *Mink*, 410 U.S. at 86. "The Act's sole concern is what must be made public or not made public." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 765 (1967). The fact that both petitioner and Herrick appear to have private pecuniary motives for their requests does not convert their motivations into private rights, in light of the obvious purpose and operation of FOIA.[11]

Moreover, a victory by one FOIA litigant, even one with private, pecuniary motivations, is, in fact, a vindication of the *public* right to disclosure. "As a general rule, if the information is subject to disclosure, it belongs to all." *Favish*, 541 U.S. at 172. "[O]nce there is disclosure, the information belongs to the general public." *Id.* at 174. Thus, "once [an agency] is required to disclose records to one member of the public, the FOIA requires it to release the same records to any other citizen who

---

[11] As amici National Security Archive et al. note (Br. 12), where one requester seeks disclosure of documents that contain the requester's own private information and a third-party also seeks disclosure of the same documents, the two requesters would not stand on equal footing. See *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 13-14 (1988) (holding that, under Exemption 5, a federal prisoner could invoke FOIA to gain access to his presentence report, but that requests by third parties could be denied to protect the inmate's privacy interests). But the rule adopted below would not recognize privity in those circumstances. Obviously, in such a situation, a requester against whom the privacy interest would bar disclosure would not be an adequate representative of one as to whom the privacy interest would not preclude disclosure.

requests them." *News-Press* v. *United States DHS*, 489 F.3d 1173, 1187 (11th Cir. 2007). And, where there is reason to believe that a document is "likely to become the subject of subsequent requests," an agency is required to make the document available to the public electronically. 5 U.S.C. 552(a)(2)(D).

The public nature of the right under FOIA, together with its minimal standing requirement, creates particularly fertile ground for vexatious litigation by disappointed litigants and demonstrate why petitioner's proposed standard would provide no protection against such burdensome relitigation. For example, whereas a rule of preclusion against a party's agent in a subsequent suit might be effective to cut off some duplicative litigation in the private law context, it would be entirely ineffectual against serial FOIA litigation. In a typical private law context, with a typical requirement to show standing, petitioner would likely have had to demonstrate that he had a contract with Herrick to restore the plane in order to prove a sufficient personal stake to sue for disclosure of the F-45 drawings. Under FOIA, on the other hand, petitioner was able to assert his FOIA claim without any such showing. If only agents in a narrow, technical sense were precluded from bringing a further suit, Herrick could litigate his claim over and over again in this context, in every federal judicial district in the country, simply by asking different collaborators to assist him, but without going so far as to establish an agency relationship with them.

Petitioner's argument (Pet. Br. 33-36) that, in the absence of a legal relationship, notice of the first litigation at the time it occurs is an absolute prerequisite to preclusion is similarly flawed. Under such a rule, Herrick could relitigate his FOIA loss endlessly, as long as

each new proxy he chose was unaware of his earlier failed attempts. But when the second litigation is essentially derivative of the first—indeed, where the lack of success of the earlier litigation is the sine qua non of the second suit—contemporaneous notice of the first suit is beside the point. For these reasons, and because a FOIA litigant requests relief—an injunction—that is equitable in nature, see 5 U.S.C. 552(a)(4)(B), preclusion principles should be applied in a manner that takes account of these special attributes of FOIA and litigation under it.

The court of appeals' holding prevents such vexatious relitigation by a single person or coordinated group. But that holding does not, contrary to the suggestion of amici National Security Archive et al. (Br. 14-15), threaten to preclude independent requests by "FOIA requesters from public interest, academic or journalism perspectives" simply because they might utilize a common attorney, or participated in "list serves, newsletters, conferences" or the like at which cases are discussed. The court of appeals specifically disclaimed application of its ruling to such circumstances. Pet. App. 18a (noting that "shared interest in antique aircraft," "membership in the same organizations," and representation by a common lawyer would not warrant preclusion without the further evidence of a close relationship that was present here).[12]

Instead, the court of appeals' rule draws the proper distinction. It allows separate requests by independent

---

[12] The concerns of amicus American Dental Association (ADA) are misplaced for similar reasons. See ADA Amicus Br. 1 (concern that "the result in a suit brought by one of [an association's] members necessarily binds other members, or the organization itself, in subsequent litigation").

scholars, news organizations, and the like to be made and even litigated separately, thus ensuring that litigation concerning documents that are truly of significance to the public's ability to monitor its government could go forward. On the other hand, where a single individual desires to obtain documents (ones, in this case, that had not been requested in at least 40 years) for his own commercial reasons, because he does not want to pay to obtain the information on the market, the court of appeals' rule bars that requester from getting a second bite via proxies. The inequities and potential for abuse are palpably acute in a suit like this. Where, as here, such information is assertedly the property of another private party that submitted it to a government agency, the private party that owns the information would, if it wished to protect its secrecy and the value of its asset, be forced to intervene and participate in repeated litigation along with the government.

2. In light of the "close working relationship" between petitioner and Herrick with respect to the FOIA litigation, the judgment in Herrick's suit is binding here

Petitioner was anything but the classic "stranger" that this Court has held may not generally be bound by another's prior adverse judgment. Pet. Br. 20-21. Rather, he was a "close associate" whom Herrick had asked to help restore Herrick's plane. And it was that common interest that gave rise to both Herrick's and petitioner's FOIA requests to obtain copies of Fairchild's technical drawings for the plane. Petitioner's interest is in every sense derivative of Herrick's. It is Herrick's airplane that is the source of both Herrick's direct and petitioner's less direct interest in the lawsuit. Moreover, petitioner's FOIA claim was initiated less

than a month after the loss in Herrick's suit, used the same lawyer and discovery from the first action, and explicitly invoked and sought to build upon what had assertedly already been "adjudicated" in Herrick's case. See p. 6, *supra*. This case therefore is a classic example of "exploit[ing] technical nonparty status in order to obtain multiple bites of the litigatory apple." *Gonzalez*, 27 F.3d at 761. Given both the nature of the interest at stake and the extent of the relationship between Herrick and petitioner, the lower courts were correct to hold that petitioner was bound by the judgment in the first FOIA suit.

Petitioner acknowledges that he could properly be bound by the judgment in Herrick's FOIA suit if he was acting as Herrick's "undisclosed agent[]" in bringing the second FOIA action. See Pet. Br. 23 n.4, 24 n.5. That concession is significant because it demonstrates petitioner's recognition that res judicata may, in certain circumstances, apply even absent a legal obligation on the part of the first litigant to represent the second litigant's interests, or contemporaneous notice of the first litigation. Preclusion is appropriate, even when those elements are lacking, if, in the language of the first Restatement of Judgments, the second litigant is acting on "account" of the first. Restatement of Judgments § 85(2), at 402-403. Although the lower courts did not analyze Herrick and petitioner's relationship in the technical terms of agency law, they did undertake a careful assessment of "the real (fact-specific) question" whether there was "the kind of link between the earlier and later plaintiffs that justifies binding the second [plaintiff] to the result reached against the first." *Tice*, 162 F.3d at 971. After examining the reality of their relationship, the courts concluded that petitioner and Herrick "had a

close working relationship relative to these successive cases," Pet. App. 17a, that warranted a finding of privity. That conclusion is amply supported by the record below.

The record reveals that Herrick and petitioner had not merely a parallel or common interest, but a joint interest in obtaining release of the F-45 technical drawings: "the restoration of Herrick's F-45." Pet. App. 10a. Petitioner's motion for discovery candidly noted that Herrick owned one of "only two of the F-45s [that] exist today" and was "in the process of repairing the aircraft," and that Herrick "needed the plans and specifications" to assist in the restoration. J.A. 28. That interest had, in turn, given rise to Herrick's FOIA request, J.A. 28-32, and, in turn, to petitioner's request. After recounting Herrick's FOIA litigation, *ibid.*, petitioner explained that "Herrick has now requested [petitioner] to assist him with the repair of his aircraft," J.A. 32, and that petitioner had therefore "requested that the FAA loan the material to him under the FOIA." *Ibid.* The admissions in petitioner's court filing demonstrated that "Herrick and [petitioner] had *the same motivation* to obtain the documents, viz., the restoration of Herrick's F-45." Pet. App. 10a (emphasis added). In light of the fact that petitioner's FOIA claim is expressly premised on the fact that "Herrick had asked [petitioner] to assist him with the repair of his aircraft," *ibid.*, it should not matter if Herrick has not as explicitly asked petitioner to assist him in the repair of his FOIA lawsuit.

Herrick and petitioner's common interest in obtaining the F-45 drawings gave rise to a "close working relationship" with respect to the litigation itself. Pet. App. 17a. Petitioner "filed his FOIA request for the F-45 documents almost immediately after the Tenth Circuit

decided *Herrick*," *id.* at 16a, and did so using "the same lawyer" Herrick used, *id.* at 13a. Moreover, Herrick "shar[ed] with [petitioner] the information he obtained through discovery," *ibid.*, and petitioner's Motion for Discovery in the present litigation reflects the view that this is simply a continuation of the earlier suit. See J.A. 27-32 (referring repeatedly and in great detail to the *Herrick* discovery and procedural history). At times, the motion even suggests that it is written on behalf of Herrick, J.A. 31 ("Mr. Herrick does not agree" with the Tenth Circuit's analysis); J.A. 32 ("a remand [in *Herrick*] would have been more appropriate in the plaintiff's view"), or Herrick and petitioner together, J.A. 35-36 ("*We* would like to see any updates on what has been entered in the records" since discovery in *Herrick*.) (emphasis added). Petitioner's treatment of the issue decided by the Tenth Circuit in Herrick's favor as something that "has already been adjudicated," J.A. 32, while attacking the portion of the Tenth Circuit's decision adverse to Herrick, demonstrates the extent to which petitioner's suit was simply a continuation of Herrick's, but in a different court with the benefit of a trial run and the hope of obtaining a better result.

It is of no consequence that Herrick had only requested petitioner to help restore the plane and there was not a formal "agreement" between the two, Pet. App. 11a n.*, or that court of appeals felt unable to determine whether Herrick and petitioner specifically coordinated on petitioner's filing of a second FOIA suit when Herrick's failed, *id.* at 17a.[13] The "realities of the

[13] It is noteworthy, however, that the district court did feel comfortable "conclud[ing] that the instant case is one of deliberate maneuvering to avoid the effect of Herrick's abortive litigation." Pet. App. 35a. Indeed, the district court was so convinced of deliberate maneuvering

parties' relationships," *Anchor Glass Container Corp.*, 426 F.3d at 879 (quoting *Myers*, 55 Pa. D. & C. 4th at 101), were that Herrick and petitioner had a shared interest in restoring the plane, and, hence, a shared purpose for obtaining the technical drawings (and, apparently, of obtaining the drawings without paying Fairchild for them). Petitioner's FOIA request was thus in furtherance of what by that time was their shared goal, "the restoration of Herrick's F-45," Pet. App. 10a, just as Herrick's FOIA request had been, and indeed petitioner invoked and sought to build upon the judgment in Herrick's case in pursuit of their shared goal. For these reasons, and because Herrick and petitioner were concededly "close associate[s]," *id.* at 15a, the preclusive effect of the judgment in Herrick's suit properly applies to petitioner as well.

Despite all of the foregoing evidence and the court of appeals' specific recognition that "Herrick and [petitioner] had a close working relationship relative to these successive cases," Pet. App. 17a, petitioner clings to the fact that "neither lower court purported to find" that petitioner "was acting as Herrick's agent in bringing this case," Br. 24 n.5. But the courts have recognized privity in similar situations in numerous cases without making a specific finding of "agency." See, *e.g.*, *Gustafson*, 213 Fed. Appx. at 874, 877 (second redistricting

---

on the part of petitioner that he admonished petitioner's counsel that he had come close "to the brink of an unpleasant rendezvous with Rule 11." J.A. 95. Although the court of appeals did not find it necessary to resolve definitively whether there had been manipulation, the court acknowledged that the record evidence "suggests Herrick and [petitioner] coordinated the filing of [petitioner's] request * * * so that [petitioner] could try where Herrick had failed, to the benefit of both." Pet. App. 17a.

challenge barred by first where committee coordinating litigation on behalf of political party was the "driving force[]" behind both suits, including recruiting the second plaintiffs, raising funds, and making litigation decisions); *Tyus*, 93 F.3d at 456-457 (second challenge to aldermanic district boundaries barred where several plaintiffs who were parties to prior adjudication, "[i]n an effort to circumvent trial strategy disagreements," filed a second suit with the same lawyer, "simply adding new plaintiffs" who shared "a special commonality of interests"); *Jaffree*, 837 F.2d at 1463, 1467-1469 & n.19 (wife and minor children precluded where father had brought prior suit under Section 1983 on behalf of three other children to challenge the prevalence of religion in the public schools, where court filings "demonstrated the inextricable linkage between" the two actions); *Petit* v. *City of Chicago*, 766 F. Supp. 607, 610, 612-613 (N.D. Ill. 1991) (second suit by white police officers to challenge promotional examination barred where certain plaintiffs were parties to prior litigation and had, after motion to dismiss without prejudice was denied, filed second suit, with same counsel, that added additional white officer plaintiffs); *Crane*, 602 F. Supp. at 286-288, 293-294 (preclusion where milk producer was recruited as plaintiff because it was not a formal member of the association that had litigated and lost).

Moreover, as previously discussed, if a formal agency relationship were required to establish preclusion, there would, in effect, be no end to FOIA litigation. Because no individualized interest in the documents needs to be established to make a FOIA request or proceed to court, an individual wishing access to another person's valuable documents that are in the government's possession could force the government and owner of the property to de-

fend repeated FOIA lawsuits, as long as the individual steered clear of creating an agency relationship with the serial requesters.

The demanding standard adopted by the court of appeals, which was amply satisfied here, prevents such litigation gamesmanship and attendant waste of resources without, as a general matter, interfering with the use of FOIA by "reporters, public interest organizations, and academics, who are likely to associate with others having similar interests," but who pursue independent requests under FOIA. Pet. App. 17a.

II. THE COURT OF APPEALS DID NOT DEPRIVE PETITIONER OF DUE PROCESS BY HOLDING THAT LITIGATION OF HIS FOIA CLAIM WAS BARRED BY THE JUDGMENT AGAINST HERRICK

Petitioner contends (Pet. Br. 13-14) that, despite his and Herrick's "close working relationship relative to the[ir] successive cases," Pet. App. 17a, it would be a violation of due process to treat the judgment in Herrick's suit as binding on petitioner. For the reasons discussed above, the court of appeals properly concluded that petitioner and Herrick were in privity, and that the judgment against Herrick therefore also binds petitioner. Even assuming, as petitioner contends, that his relationship with Herrick did not satisfy the highly technical requirements for privity that petitioner proposes, it would not violate petitioner's due process rights to hold that the judgment in Herrick's own suit to vindicate the public interest under FOIA bars petitioner from relitigating that claim.

The requirements of procedural due process depend upon an assessment of the nature of the private and governmental interests at stake and a balancing of those

interests. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The critical fact with respect to that balancing in this case, discussed above, see pp. 34-38, *supra*, is that a claim under FOIA is one to vindicate the public interest in disclosure, not any private interest. As the Court recognized in *Richards*, due process does not protect one's right to sue on behalf of the public interest in the same manner it protects the right to sue on behalf of one's own property interest. 517 U.S. at 803. And especially when the principles of standing applicable to traditional private suits would stymie a suit like this, due process does not demand a more favorable rule than less traditional public suits with less individualized interests at stake.

It is true, as petitioner states (Pet. Br. 31-32), that FOIA deems each person who is denied access to requested records to have suffered a sufficient personal injury that he has standing to sue. See 5 U.S.C. 552(a)(4)(B); cf. *Akins*, 524 U.S. at 21 (inability to obtain information pursuant to statutory scheme is a "concrete and particular" "injury in fact" that satisfies Article III standing). But plaintiff is incorrect to argue that every interest sufficient to confer standing is a "chose in action" and "protected property interest in its own right" as to which the full panoply of due process rights attaches. Pet. Br. 32 (quoting *Richards*, 517 U.S. at 804).

Richards and the cases it relied upon in the discussion cited by petitioner involved personal claims that had value. In *Richards* itself, the claim was to prevent the county from taking the plaintiffs' money through taxation. 517 U.S. at 803. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), the claim was one under a state discrimination law "which presumably [could] be surrendered for value." *Id.* at 431. *Phillips Petroleum*

Co. v. *Shutts*, 472 U.S. 797 (1985), concerned claims for royalties from gas leases. *Id.* at 800-801. And in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), it was a homeowner's right to alienate his property. *Id.* at 37-38. None of those cases concerned a statutorily created right to bring suit to further a public right, such as the right to have information made available to the public under FOIA. That right, as discussed above, see pp. 34-38, *supra*, is akin to a taxpayer's right to bring an action *quo warranto* on behalf of the public at large, as to which, *Richards* assumed, "the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." 517 U.S. at 803.

As *Richards* indicated, it is well-established that the judgment in a *quo warranto* action brought by one taxpayer on behalf of the public is binding on all taxpayers. See, *e.g.*, *Hodgkins* v. *Sansom*, 135 S.W.2d 759 (Tex. Civ. App. 1939) (taxpayer challenge to school bond election because of board member's alleged disqualification barred by judgment on identical claim in prior taxpayer suit); *Sullivan*, 50 P.2d at 253-254 (same); *Tallassee*, 89 So. at 516-517 (*quo warranto* action to annul town's incorporation barred by prior judgment in similar action by different taxpayer); *ibid.* (citing cases to similar effect from Texas, Illinois, Nebraska, Virginia, and California). Indeed, the preclusive effect of a *quo warranto* proceeding on similar taxpayer suits raising the same claim has been the rule since the English common law. Blackstone explained that "[a] writ of *quo warranto* is in the nature of a writ of right for the king, again[s]t him who claims or u[s]urps any office, franchi[s]e, or liberty, to inquire by what authority he [s]upports his claim, in

order to determine the right." 3 William Blackstone, *Commentaries* *262. "The judgment on a writ of quo warranto," he continued, "(being in the nature of a writ of right) is *final and conclu[s]ive even again[s]t the crown*." *Id.* at *263 (emphasis added).

As petitioner notes (Pet. Br. 31), a true taxpayer-standing case does not generally satisfy Article III's requirements for standing. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006) (state taxpayers lacked Article III standing to bring a Commerce Clause challenge to a State's award of a franchise tax credit to a manufacturer). But that does not mean that there are no "public rights" under federal law as to which less demanding standards of due process would apply. Notably, several federal statutory schemes contemplate that one individual's right to litigate can be displaced as a result of litigation by another. See, *e.g.*, 42 U.S.C. 2000e-2(n)(1)(B)(ii) (barring challenge to a civil rights judgment or order "by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation"); cf. 33 U.S.C. 1319(g)(6)(A)(ii) (citizen suit under Federal Water Pollution Control Act Amendments of 1972 barred by action brought by State); 31 U.S.C. 3730(b)(5) (first-filed qui tam suit bars further qui tam suits based on the same facts). Those statutes create no constitutional difficulty and presumably Congress could constitutionally mandate that for at least most FOIA exceptions, but cf. note 11, *supra*, the first final judgment in a FOIA case as to certain documents is preclusive as to all. It certainly does not create even a serious question for the courts to adopt rules with as much flexibility as

the one adopted below to weed out duplicative FOIA litigation.

Because petitioner's right to bring an action under FOIA to compel public disclosure of documents in the government's files is a suit to vindicate the public's right to information, it would transgress no limitations of the Due Process Clause to hold that another suit by an adequate representative to vindicate the same public right bars relitigation of the claim, even in the absence of the type of legal relationship that petitioner believes is required by privity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

MARCH 2008

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAR 19 2008
OFFICE OF THE CLERK

(13)

No. 07-371

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT THE FAIRCHILD CORPORATION

EMILY M. YINGER
N. THOMAS CONNALLY
MICHAEL M. SMITH
HOGAN & HARTSON LLP
8300 Greensboro Drive
Suite 1100
McLean, VA 22102
(703) 610-6126

*Counsel of Record

CATHERINE E. STETSON*
CHRISTOPHER T. HANDMAN
DOMINIC F. PERELLA
HOGAN & HARTSON LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

Counsel for Respondent The Fairchild Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

600745 51P

QUESTION PRESENTED

Petitioner Taylor filed a Freedom of Information Act ("FOIA") lawsuit, seeking the same documents—for the same purpose—that his "close associate," Greg Herrick, had previously and unsuccessfully sought. Applying a functional privity inquiry that looked beyond formal legal relationships and instead examined whether the two litigants shared identical interests, whether Taylor was adequately represented by Herrick, and whether there existed a sufficient "affirmative link" between the two, the District Court and Court of Appeals found that Taylor was Herrick's privy.

The question presented is whether the D.C. Circuit correctly held, based on the record facts, that Taylor was in privity with Herrick so as to be bound by the judgment in Herrick's case.

CORPORATE DISCLOSURE STATEMENT

Respondent The Fairchild Corporation has no parent corporation and no publicly held company owns ten percent or more of The Fairchild Corporation's common stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. PRIVITY IS A FUNCTIONAL, FACT-BASED INQUIRY 18

II. TAYLOR'S "LEGAL RELATIONSHIP" THEORY IS AT ODDS WITH THE LAW AND IS NOT REQUIRED BY DUE PROCESS 29

A. The "Legal Relationship" Theory Cannot Be Reconciled With Res Judicata Law 29

B. Due Process Does Not Impose A "Legal Relationship" Requirement 36

III. TAYLOR'S "NOTICE" THEORY ALSO IS WITHOUT BASIS 41

IV. POLICY CONSIDERATIONS FAVOR AFFIRMANCE 43

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases:

Ahng v. *Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996) 25

American Forest Council v. *Shea*, 172 F. Supp. 2d 24 (D.D.C. 2001) 11

Arizona v. *California*, 530 U.S. 392 (2000) 24

Blagge v. *Balch*, 162 U.S. 439 (1896) 43

Blonder-Tongue Labs., Inc. v. *University of Ill. Found.*, 402 U.S. 313 (1971) ..... *passim*

Boeing Co. v. *Sierracin Corp.*, 738 P.2d 665 (Wash. 1987) 6

Bruszewski v. *United States*, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950) 19, 21

Burnham v. *Superior Court*, 495 U.S. 604 (1990) 46

Cafeteria & Rest. Workers Union v. *McElroy*, 367 U.S. 886 (1961) 37, 38, 40

Casa Marie, Inc. v. *Superior Court*, 988 F.2d 252 (1st Cir. 1993) 31

Center for Auto Safety v. *NHTSA*, 93 F. Supp. 2d 1 (D.D.C. 2000) 6

Chase Manhattan Bank, N.A. v. *Celotex Corp.*, 56 F.3d 343 (2d Cir. 1995) 23

TABLE OF AUTHORITIES—Continued

Page

Chase Nat'l Bank v. *City of Norwalk*, 291 U.S. 431 (1934) 19

Commissioner v. *Sunnen*, 333 U.S. 591 (1948) 46

Coryell v. *Phipps*, 317 U.S. 406 (1943) 20

Crane v. *Commissioner of Dep't of Ag., Food & Natural Res.*, 602 F. Supp. 280 (D. Me. 1985) 23

Davis v. *Department of Justice*, 968 F.2d 1276 (D.C. Cir. 1992) 8

Drummond v. *United States*, 324 U.S. 318 (1945) 30

Eddy v. *Waffle House*, 482 F.3d 674 (4th Cir. 2007) 46

Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 38

Fleming v. *Cooper*, 284 S.W.2d 857 (Ark. 1955) 39

Garcia v. *Wilson*, 820 P.2d 964 (Wash. Ct. App. 1991) 23

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 37, 38, 43

Gonzalez v. *Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994) ..... *passim*

Hansberry v. *Lee*, 311 U.S. 32 (1940) 32, 38, 39, 40

TABLE OF AUTHORITIES—Continued

Page

Hart Steel Co. v. *Railroad Supply Co.*, 244 U.S. 294 (1917) 47

Headwaters Inc. v. *U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) 28

Herrick v. *Garvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000) ..... *passim*

Herrick v. *Garvey*, 298 F.3d 1184 (10th Cir. 2002) ..... *passim*

Ibrahim v. *District of Columbia*, 463 F.3d 3 (D.C. Cir. 2006) 11

In re Teltronics Servs., Inc., 762 F.2d 185 (2d Cir. 1985) 22

Jaffree v. *Wallace*, 837 F.2d 1461 (11th Cir. 1988) 23

Jefferson Sch. of Soc. Sci. v. *Subversive Activities Control Bd.*, 331 F.2d 76 (D.C. Cir. 1963) 12, 24

Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U.S. 123 (1951) 37

Kourtis v. *Cameron*, 419 F.3d 989 (9th Cir. 2005) 20

Lubrizol Corp. v. *Exxon Corp.*, 929 F.2d 960 (3d Cir. 1991) 22

Mars Inc. v. *Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616 (Fed. Cir. 1995) 22

TABLE OF AUTHORITIES—Continued

Page

Martin v. *Wilks*, 490 U.S. 755 (1989) 12, 39

Mellon Bank, N.A. v. *Metro Commc'ns, Inc.*, 945 F.2d 635 (3d Cir. 1991), *cert. denied*, 503 U.S. 937 (1992) 22

Montana v. *United States*, 440 U.S. 147 (1979) ..... *passim*

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 37

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 41

Nevada v. *United States*, 463 U.S. 110 (1983) 18

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 18, 32

Pedrina v. *Chun*, 97 F.3d 1296 (9th Cir. 1996), *cert. denied*, 520 U.S. 1268 (1997) 12

Petit v. *City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991) 23

Postal Tel. Cable Co. v. *City of Newport*, 247 U.S. 464 (1918) 19

Public Citizen Health Research Group v. *FDA*, 704 F.2d 1280 (D.C. Cir. 1983) 6

Ramos v. *Horton*, 456 S.W.2d 565 (Tex. App. 1970) 23

Richards v. *Jefferson County*, 517 U.S. 793 (1996) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Sniadach v. *Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) 43

South Central Bell Tel. Co. v. *Alabama*, 526 U.S. 160 (1999) 34, 35

Southern Pac. R.R. v. *United States*, 168 U.S. 1 (1897) 18, 19

Southwest Airlines Co. v. *Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir. 1977) 24

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940) 19

Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003) 23

Tice v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), *cert. denied*, 527 U.S. 1036 (1999) 12, 23

Tyus v. *Schoemehl*, 93 F.3d 449 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997) 12, 20, 24, 28

United States v. *Fior D'Italia, Inc.*, 536 U.S. 238 (2002) 28

United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) 5

TABLE OF AUTHORITIES—Continued

Page

United States ex rel. Bilokumsky v. *Tod*, 263 U.S. 149 (1923) 28

United Techs. Corp. v. *FAA*, 102 F.3d 688 (2d Cir. 1996), *cert. denied*, 521 U.S. 1103 (1997) 6

Wilkinson v. *Austin*, 545 U.S. 209 (2005) 37

Zedner v. *United States*, 547 U.S. 489 (2006) 20

Statutes:

5 U.S.C. § 552(b)(4) 6

12 U.S.C. § 632 43

28 U.S.C. § 1254(1) 1

Regulation:

14 C.F.R. Part 21 4

Other Authorities:

Black's Law Dictionary (8th ed. 2004) 43

Budd Davison, *Fairchild's Model 45*, Air Progress Magazine (Nov. 1991) 4

Fairchild Aviation Corp., U.S. Centennial of Flight Commission 3

Simon Greenleaf, *A Treatise on the Law of Evidence* (13th ed. 1899) 19

TABLE OF AUTHORITIES—Continued

Page

Philip Makanna, *Fabulous Fairchild: Golden Age Classic Keeps On Flying*, Air Classics Magazine (Jan. 2006) 4

Restatement (Second) of Judgments (1980) ..... *passim*

Michelle Seaton, *An Air of Greatness*, Showcase Magazine (Aug. 2000) 7

Frank Woodring *et al.*, *Fairchild Aircraft* (2007) 4

18A Charles A. Wright *et al.*, *Federal Practice & Procedure* (2d ed. 2002) 13, 20, 31, 39

IN THE

Supreme Court of the United States

No. 07-371

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT THE FAIRCHILD CORPORATION

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 22, 2007. The petition for a writ of certiorari was filed on September 17, 2007, and was granted on January 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case presents a question courts have confronted for centuries: when should two litigants

be found to be in privity with each other? Petitioner maintains that the question can be resolved by applying a handy universal rule: unless the two shared a "legal relationship"—a phrase variously defined in petitioner's brief as one conferring "authority" or "obligation" or "accountability" on one party vis-a-vis another—no privity can attach.

But petitioner's preferred categorical rule carries with it a number of qualifications, some of which he acknowledges, others not. This Court's prior precedents, for example, force him to qualify his "legal relationship" test to distinguish the circumstances where a second litigant with *no* legal relationship to the first was held barred from pursuing a second suit because it had controlled the first. Petitioner also does not attempt to explain the many cases where a second litigant with no legal relationship to the first was held barred from pursuing a subsequent suit because of inequitable conduct. And petitioner offers in the alternative that perhaps if no legal relationship exists *but* actual notice was evident—or if not evident, could (in certain specified circumstances carefully designed to exclude these facts) be said to have constructively occurred—then a rigid "notice" rule might sometimes suffice.

All of these caveats and provisos suggest that petitioner's categorical solution is ill-tailored to the problem it purports to solve. The D.C. Circuit, like many courts before it, took a different approach—one that acknowledged the functional nature of the privity inquiry. The Court of Appeals articulated a number of settled factors designed to test the bona fides of the party before it, examined the unrebutted facts in evidence relating to each, and concluded that

on these facts, the District Court appropriately had found Taylor to be functionally the same as, and therefore in privity with, an earlier litigant. As with other areas of the law susceptible to a multitude of factual scenarios, the court's flexible, pragmatic approach led to a most sensible result.

Taylor's categorical rule is unnecessary as a constitutional matter; the D.C. Circuit's test adequately ensures that subsequent litigants in preclusion cases receive the process they are due. Taylor's rule also is undesirable as a practical matter; it denies district courts the full range of tools to identify and root out instances where two successive litigants improperly manipulate the docket. The judgment below should be affirmed.

STATEMENT OF THE CASE

1. The Fairchild Company's earliest planes date to another era: the "Golden Age of Aviation" of the 1920s and 1930s. Fairchild's first plane, the FC-1, first flew in 1926. A monoplane with wings that folded for storage, the FC-1 was the first American aircraft to include a fully enclosed cockpit and hydraulic landing gear.[1]

The Great Depression destroyed some aircraft manufacturers, but Fairchild weathered the hard times, and "as the first glimmers of economic hope started in 1934, the company decided that there was a market for a luxury private aircraft that would have an interior to match a first-class auto or

---

[1] *Fairchild Aviation Corp.*, U.S. Centennial of Flight Commission, *available at* http://www.centennialofflight.gov/essay/Aerospace/Fairchild/Aero25.htm.

airliner."[2] That plane was the F-45, a five-seat monoplane advertised as the "Sedan of the Air."[3]

The F-45 boasted a unique "advanced design whose influence is certain to be reflected in craft of the future." 10th Cir. App. 110, *Herrick* v. *Garvey*, 298 F.3d 1184 (10th Cir. 2002) (No. 01-8011) ("*Herrick II*"). The plane had a "cavernous" cabin with "living room appointments," and, memorably, it sported fabric-covered wings and fuselage.[4]

The prototype F-45 made its debut flight on May 31, 1935, and over the years that followed sixteen were built.[5] But the F-45 never caught on. As the Second World War approached, Fairchild was inundated with military orders for other models, and the F-45 ceased production, never to resume.[6]

2. Before Fairchild could begin commercial production of the F-45, it was required under federal law to apply for and obtain a "type certificate" giving it "the legal right to produce the new type of aircraft." *Herrick II*, 298 F.3d at 1188; *see also* 14 C.F.R. Part 21 (detailing information required in applications). The type-certificate application process requires manufacturers to submit detailed

---

[2] Philip Makanna, *Fabulous Fairchild: Golden Age Classic Keeps On Flying*, Air Classics Magazine, Jan. 2006, at 18, *available at* http://findarticles.com/p/articles/mi_qa3901/is_200601/ai_n15971856.

[3] *Id.*

[4] Budd Davison, *Fairchild's Model 45*, Air Progress Magazine, Nov. 1991, at 49, 53, *available at* http://www.airbum.com/pireps/PirepFairchild45.html.

[5] Frank Woodring *et al.*, *Fairchild Aircraft* 21 (2007).

[6] Makanna, *supra* n.2, at 18.

documentation, including "designs, drawings, test reports, and computations necessary to show that the aircraft sought to be certificated satisfies FAA regulations." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805 (1984) (citations omitted). "If the FAA finds that the proposed aircraft design comports with minimum safety standards, it signifies its approval by issuing a type certificate." *Id.* at 806.

In 1935, Fairchild submitted to the FAA's predecessor, the Civil Aeronautics Administration ("CAA"), its "Application for Approved Type Certificate" for the F-45. *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321, 1324 (D. Wyo. 2000) ("*Herrick I*"). The CAA granted Fairchild the type certificate in April 1936 and thereafter kept on file the documentation Fairchild had submitted. Joint Appendix ("J.A.") 16; *Herrick II*, 298 F.3d at 1188-89.

The F-45 documentation is voluminous. It includes hundreds of blueprints, detailed drawings, and diagrams of the F-45, from the plane's wings and landing gear down to its bolts and hinges. J.A. 78; D.C. Cir. App. A161-A207 (list of drawings on file). "The level of detail in the drawings is extraordinary. For virtually every part of the aircraft, there are numerous drawings and subdrawings that portray the exact specifications of each part." D.C. Cir. App. A215. The F-45 type certificate file also includes engineering analyses and test reports. J.A. 78; *Herrick I*, 200 F. Supp. 2d at 1326. It contains, in sum, all of the "plans, formulae, processes and procedures which were used for the development, quality assurance, and manufacture of the Fairchild F-45 aircraft." J.A. 78.

Fairchild's F-45 certification materials are the company's trade secrets—its confidential plans and processes, representing "the end product of either innovation or substantial effort." *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see* 5 U.S.C. § 552(b)(4) ("FOIA Exemption 4") (exempting from disclosure under FOIA "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").[7] These materials remain commercially valuable today. *See* D.C. Cir. App. A117. For one thing, they have substantial value in the antique-airplane market because they make it much easier to repair the plane and demonstrate to the FAA that it is airworthy. *Id.*; J.A. 78-79. They also "are * * * valuable in the production of replicas for flight." J.A. 79. And they retain additional value for Fairchild because they include formulas, specifications, and engineering data reflecting "years of costly and complex research" and that are "applicable not only to the F-45 aircraft but to other airframes * * * and industrial applications." D.C. Cir. App. A144-145.

3. Only two F-45s are believed to still exist. One of them belongs to Greg Herrick. J.A. 28. Herrick is a self-proclaimed lifelong antique airplane buff: "As a boy growing up in Ottumwa, Iowa, [he] used to go to

---

[7] *See also United Techs. Corp.* v. *FAA*, 102 F.3d 688 (2d Cir. 1996) (engine drawings submitted to FAA were confidential under Exemption 4), *cert. denied*, 521 U.S. 1103 (1997); *Boeing Co.* v. *Sierracin Corp.*, 738 P.2d 665 (Wash. 1987) (drawings of airplane window assemblies were protected trade secrets). The age of the materials sought does not remove them from Exemption 4's protections. *Center for Auto Safety* v. *NHTSA*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000).

air shows sponsored by the Antique Airplane Association," and he is now one of "a small group of aircraft collectors who sometimes spend millions of dollars for rare historical planes." Michelle Seaton, *An Air of Greatness*, Showcase Magazine 158, 160-161 (Aug. 2000) (attached as Ex. 1 to Fairchild Corp.'s Mot. for Summ. J. (Jan. 10, 2005)).

In November 1997, Herrick filed a FOIA request with the FAA, seeking the contents of the F-45 type-certificate file. *See Herrick II*, 298 F.3d at 1188. Herrick sought the type-certificate data so that he could repair his F-45 and fly it. *Id.*; J.A. 28.

The FAA "customarily" treats type-certificate materials as trade secrets, "as they typically contain plans, drawings, process specifications, or other information describing a device to be manufactured for commercial profit." J.A. 77. The agency accordingly denied Herrick's FOIA request, stating that the requested materials fell within FOIA Exemption 4 as trade secrets. *Herrick II*, 298 F.3d at 1188. Herrick filed an administrative appeal, but the FAA denied it. The agency stated that it had contacted Fairchild, that the company objected to the release of the documents, and that Exemption 4 continued to apply. *Id.* at 1189.

Herrick then filed suit in the U.S. District Court for the District of Wyoming, employing among other counsel Michael J. Pangia. *Herrick I*, 200 F. Supp. 2d at 1322. Herrick argued before the Wyoming district court that Fairchild no longer owned the type-certificate documents because they had been submitted to the CAA by a predecessor company. He also argued that the documents lost their "trade secret" status in 1955, when Fairchild authorized in

principle a limited release of some documents to requestors for certain purposes—a release that never occurred because no requestors materialized.

The district court rejected Herrick's arguments. It first held that Fairchild still owned the type-certificate documents. *Id.* at 1328. As to Herrick's claim that the documents had lost their FOIA trade-secret status by virtue of a limited release issued over a decade before FOIA was enacted, the court held that even if that were so, Fairchild had restored the documents' protected status by refusing to permit disclosure to Herrick, thereby effectively rescinding the limited release *before* any relevant documents were made public. *Id.* at 1329.[8]

Still represented by Pangia, Herrick appealed to the Tenth Circuit and lost again. *Herrick II*, 298 F.3d at 1195.

4. A week after the Tenth Circuit issued its mandate in *Herrick II*, a new FOIA request for the same F-45 documents was filed by one Brent Taylor. J.A. 20. Taylor is a resident of Ottumwa, Iowa, and the president of the Ottumwa-based Antique Airplane Association. J.A. 32; D.C. Cir. App. A262. He is a mechanic who restores vintage aircraft. J.A. 53. He also knows Herrick "quite well"; the two are "close associate[s]." Pet. App. 4a, 15a; J.A. 54.

Taylor filed his FOIA request with the assistance of Pangia, Herrick's attorney. J.A. 56. The FAA again refused to release the documents, citing the same

---

[8] *See Davis* v. *Department of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (plaintiff seeking to establish waiver of FOIA exemption must "show[ ] that there is a permanent public record of the exact portions he wishes" to receive).

grounds as before. *Id.* at 38. Pangia then filed an administrative appeal on Taylor's behalf. *Id.* at 42. After an introductory paragraph, the appeal letter launched into an attack on *Herrick II*. *Id.* at 43-44.

The FAA rejected the administrative appeal in a detailed letter ruling, J.A. 45-52, and Taylor, still represented by Pangia, filed suit in the U.S. District Court for the District of Columbia. *Id.* at 14.[9] Soon after he filed his complaint, Taylor filed a "Motion to Allow Discovery," seeking documents to support the argument (rejected in *Herrick II*) that Fairchild no longer owned the type-certificate documents. *Id.* at 25, 27. In that motion, Taylor stated that Herrick—who had sought the same documentation in order to repair his aircraft—had asked Taylor to "assist him with the repair of his aircraft." *Id.* at 28, 32.

The Motion to Allow Discovery was a curious submission. Taylor discussed the *Herrick* case at length, alternating between explaining Greg Herrick's views on the case and his own and repeatedly referring to himself as "we." *See, e.g., id.* at 32 n.4, 35. He offered you-were-there details from the *Herrick II* oral argument: "The argument in the 10th Circuit was interesting, to say the least." *Id.* at 29. He reported Greg Herrick's views on the *Herrick* judgment, offering that "Mr. Herrick does not agree, of course," with the Tenth Circuit's decision. *Id.* at 31. He asked the court to accept the *Herrick* findings that he deemed favorable while rejecting those with which he disagreed. *Id.* at 32 n.4. And he explicitly

---

[9] Taylor actually filed suit before the issuance of the FAA's FOIA denial, alleging a constructive denial theory. The suit was temporarily stayed to give the FAA time to consider Taylor's request. J.A. 56.

connected his motivation for filing the FOIA request to the *Herrick* case. *Id.* at 32.

Fairchild, which previously had filed a Tenth Circuit brief in support of the District Court's ruling in *Herrick I*, moved to intervene. Fairchild explained how Taylor and Herrick are "close associates" and "are working together to restore an antique F-45 owned by Herrick." D.C. Cir. App. A74. Because there was no functional difference between Herrick and Taylor, Fairchild argued that Taylor's lawsuit "amounts to a transparent attempt" to "substitut[e] Taylor as the named plaintiff in place of Herrick." *Id.* at A72, A75.

Fairchild and the FAA moved for summary judgment. In a statement of undisputed facts attached to its motion, Fairchild again stated that Taylor and Herrick are "close associate[s]," J.A. 54, a characterization Taylor did not dispute. Pet. App. 3a. Fairchild argued that on the facts presented, Taylor was Herrick's privy and was therefore bound by the judgment in *Herrick*: "Herrick and his counsel are using Taylor to relitigate the same claims that were rejected [in *Herrick II*]. This is the classic example of 'tactical maneuvering designed unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple.'" D.C. Cir. App. A129 (quoting *Gonzaléz* v. *Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994)).[10]

5. The District Court rejected Taylor's motion for discovery and entered summary judgment in favor of Fairchild and the FAA. Pet. App. 22a. The court

---

[10] Both Fairchild and the FAA also separately argued that Taylor's FOIA action failed on the merits.

agreed with Fairchild and the FAA that under the so-called "virtual representation" branch of privity analysis, Taylor was Herrick's privy. Pet. App. 30a. Emphasizing that privity analysis "'should be applied on a case-by-case basis using a fact-specific inquiry,'" *id.* at 31a (quoting *American Forest Council* v. *Shea*, 172 F. Supp. 2d 24, 31 (D.D.C. 2001)), the court held that the facts presented justified a privity finding because they signaled "deliberate maneuvering to avoid the effects of * * * Herrick's abortive litigation." *Id.* at 35a.

So convinced was the District Court, in fact, that Taylor's follow-up litigation was "unacceptable" and "smack[ed] of forum shopping" that the court ordered Taylor and his counsel to show cause why they should not be sanctioned. *Id.* at 34a-36a. The court eventually decided not to impose sanctions. It emphasized, however, that Taylor and Herrick's lawsuits were "identical," and that Taylor and Pangia had come to the "doorstep" of "an unpleasant rendezvous with Rule 11." J.A. 95.

Taylor appealed, designating *Herrick II* as a "related case." Brief for Plaintiff-Appellant at i, *Taylor* v. *Blakey*, No. 05-5279 (D.C. Cir. June 13, 2006). After conducting a *de novo* review of the District Court's res judicata ruling, *see Ibrahim* v. *District of Columbia*, 463 F.3d 3, 7 (D.C. Cir. 2006), a unanimous D.C. Circuit panel affirmed.

The Court of Appeals, per Chief Judge Ginsburg, explained that "[a]lthough a litigant is not ordinarily bound by the judgment in a prior suit to which he was not a party, 'there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier

judgment.'" Pet. App. 5a (quoting *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996)). Privity in turn is an "'elusive concept, without any precise definition of general applicability.'" *Id.* (quoting *Jefferson Sch. of Soc. Sci.* v. *Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963)). The concept also has evolved over time; where once "privity" had a very narrow meaning, the term "'is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.'" Pet. App. 5a-6a (quoting *Richards*, 517 U.S. at 798). One such form of privity is sometimes referred to as "virtual representation"—when "'in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,'" such that the party to the prior litigation is "treated as the proxy of the nonparty." *Id.* at 6a (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989)).[11]

Determining whether two litigants are in privity calls for an "'equitable and fact-intensive'" inquiry. *Id.* at 7a (quoting *Tyus* v. *Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997)). The Court of Appeals readily acknowledged that any such inquiry must "consider and balance competing interests in due process and efficiency."

---

[11] Fairchild agrees with Taylor that the term "virtual representation" is of no real importance in this case. *See* Pet. Br. 18 (citing *Tice* v. *American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998), *cert. denied*, 527 U.S. 1036 (1999)). The D.C. Circuit deemed virtual representation "a particular form of privity," Pet. App. 6a, and other courts uniformly have taken the same approach. *See, e.g.*, *Pedrina* v. *Chun*, 97 F.3d 1296, 1302 (9th Cir. 1996), *cert. denied*, 520 U.S. 1268 (1997).

Pet. App. 8a. Too lax a test for privity, and a court "risks infringing upon the nonparty's right to due process of law." *Id.* Too rigid a standard, "on the other hand, would expose defendants to the burden of relitigation, raise the possibility of inconsistent results, and compromise the public interest in judicial economy." *Id.*

Bearing these competing interests in mind, the court articulated a flexible privity test: It required a showing of "identity of interests," "adequate representation," and at least one of "a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment," any of which if present would supply the necessary "affirmative link between the later litigant and either the prior party or the prior case." *Id.* at 8a. As the court explained, "[d]ecisions finding virtual representation have often applied the factors we adopt today, and the parties generally agree they are appropriate factors to consider." *Id.* at 9a (citing 18A Charles A. Wright *et al.*, *Federal Practice & Procedure* § 4457, at 521-528 (2d ed. 2002) ("Wright & Miller") (collecting cases)).

On the factual record before it, the Court of Appeals affirmed the District Court's privity finding. The court concluded that Taylor and Herrick shared the same incentive to reach the same result, and for the *identical* reason—"viz., the restoration of Herrick's F-45." *Id.* at 10a. "In the absence of any contrary evidence," such as an affidavit, "the district court correctly found their interests were identical." *Id.* (citation omitted). The court further concluded

that Taylor's professed interest in restoring Herrick's F-45 had been adequately represented in *Herrick I* and *II*. Pet. App. 11a. Herrick, the owner of the plane he sought to repair, had every incentive to litigate his claim "zealously," and Taylor's use of the same counsel to press his claim for the same information "strongly suggests satisfaction with the attorney's performance in the prior case." *Id.* at 14a.

The Court of Appeals also found a "close relationship" to exist between the two litigants. It explained that whether a "sufficiently close connection" existed between Herrick and Taylor to treat the two as privies was a "functional, not a formal question." *Id.* at 15a. And "the record before us indicates Herrick and Taylor were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well." *Id.* Their close association also had a direct connection with the lawsuits: "Herrick and Taylor had a close working relationship *relative to these successive cases*." *Id.* at 17a (emphasis added). In light of the facts on record, "and the complete lack of any evidence submitted by Taylor in opposition" to summary judgment, the court concluded that Taylor and Herrick were in a "close relationship" for the purpose of determining whether Herrick was Taylor's privy. *Id.* at 16a.

The court also observed that tactical maneuvering—in the sense of collusion to avoid the effects of a judgment—was a relevant factor in privity analysis. *Id.* at 16a. It found that there were facts in the record suggesting just such maneuvering, including the timing of Taylor's FOIA request, which "suggests Herrick and Taylor coordinated the filing,"

and Herrick's assistance in Taylor's lawsuit. *Id.* at 17a. It declined to resolve the "tactical maneuvering" question, however, explaining that it did not need to do so to resolve the case. *Id.*

After cataloguing the record evidence of identical interests, adequate representation, and a "close working relationship relative to these successive cases," and finding "no countervailing evidence," the court concluded that Herrick "served as Taylor's virtual representative in the litigation for the F-45 documents." *Id.*; *see also id.* at 18a (noting that Taylor submitted "no evidence to the contrary").

Taylor and his *amicus* Public Citizen had argued that a privity finding would mean anyone not a "total stranger" to an earlier litigant will be bound by that person's litigation, or that people who "associate with others having similar interests"—like some FOIA requestors—will be bound by their colleagues' litigation. *Id.* at 17a-18a. The Court of Appeals flatly rejected such an expansive reading of its holding, finding that "[t]he facts of this case simply do not implicate those concerns." And underscoring the fact-specific nature of the privity inquiry, the court emphasized that:

> Matters might look different if Taylor had submitted evidence before summary judgment * * * demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations, or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents. He did not do so, however, with the result that the record supports

finding Herrick and Taylor in privity. [*Id.* at 18a.]

On that fact-bound basis, and finding the other requirements for res judicata satisfied, *id.* at 18a-20a, the D.C. Circuit affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT

Petitioner was found to be in privity with Greg Herrick not just because they shared a hobby. He was found to be in privity with Herrick not just because they were members of the same association. He was found to be in privity with Herrick not just because he used the same lawyer, or brought the same claim. He was found to be in privity with Herrick because the D.C. Circuit concluded—in the absence of countervailing evidence—that the two litigants' interests were *identical*, that Taylor's identical interests had been adequately represented in the first case, and that the two shared a close relationship with respect to their successive cases.

This approach to privity is well-suited to the goals of res judicata. The doctrine seeks to achieve "substantial justice," *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 325 (1971) (citation omitted), and substantial justice in this corner of the law cannot be attained by formalistic line-drawing. It instead requires close attention to the facts of particular cases, all the while bearing in mind the crucial question: Is this litigant functionally the same as an earlier litigant whose claim has already been fully and fairly adjudicated? Thus the D.C. Circuit elucidated factors—identical interests, adequate representation, and a close

relationship relative to the litigation—designed to suss out the rare case where a litigant really is a proxy for his predecessor. And recognizing that one party ordinarily should not be bound by a prior judgment rendered against another party, the court pointed throughout its opinion to the utter absence of rebuttal evidence in the face of facts suggesting that in pressing this second action, the two men were functionally acting as one. The court's privity test achieves an appropriate balance between a litigant's interest in pursuing a truly independent claim and the judicial system's interest in finality of judgments.

Taylor, however, urges this Court to impose, across the universe of res judicata law, a categorical "legal relationship" requirement before res judicata may attach—or failing that, a categorical "notice" requirement. These arguments should be rejected. Taylor's proposed "legal relationship" rule contradicts established preclusion precedents. His proposed notice requirement is similarly unsupported and oversimplified; due process allows for imputed or constructive notice in cases where the second litigant is a proxy of the first.

Taylor's proposed rules are not just contrary to established preclusion law. They are, as a practical matter, quite unwise. For they would hamstring the federal courts in rare—but recurring—cases where it is clear that plaintiff recruitment, or some other inequitable collusion, is afoot. Courts at all levels, including this one, recognize that such cases may properly be struck from the docket. They should retain the power to do so where they conclude, on all the evidence, that such an outcome would be just.

The Court of Appeals' decision should be affirmed.

ARGUMENT

I. PRIVITY IS A FUNCTIONAL, FACT-BASED INQUIRY.

1. Res judicata puts to practice a fundamental principle of common-law adjudication: that a "right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies." *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48-49 (1897); *see Montana* v. *United States*, 440 U.S. 147, 153 (1979). The doctrine has remained a fixture of Anglo-American jurisprudence for centuries because, without it, litigants would be free to undermine " 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.' " *Nevada* v. *United States*, 463 U.S. 110, 129 (1983) (quoting *Southern Pac. R.R.*, 168 U.S. at 49).

The rule is thus designed to promote "the dual purpose of protecting litigants from the burden of relitigating an identical issue * * * and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). When "the same parties" attempt to relitigate what has already been resolved, *Southern Pac. R.R.*, 168 U.S. at 49, courts promote these twin objectives by applying res judicata to bar the second lawsuit. But those same objectives are equally implicated—and equally threatened—when certain non-parties to the initial litigation attempt to re-try what has already been fairly tried and adjudicated. For example, it would make no sense to let a ward or

trust beneficiary relitigate an action that is already "binding on a guardian or trustee." *Richards*, 517 U.S. at 798. That is why this Court, like the English courts that crafted the doctrine, has always extended res judicata to bar not just the parties who first brought suit but also "their privies." *Southern Pac. R.R.*, 168 U.S. at 49; *see also Blonder-Tongue*, 402 U.S. at 323; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940); *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 474 (1918).

2. To refer to a litigant as a "privy," however, is to state a conclusion. Privity "is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the res judicata." *Bruszewski* v. *United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950). Traditionally, a narrow category of formal legal relationships—executor and testator, grantor and grantee, heir and ancestor, to name a few—were the only relationships deemed "close enough" to constitute privity. *See* Simon Greenleaf, *A Treatise on the Law of Evidence* § 523 (13th ed. 1899). But in recent decades the term has been put to broader service. As this Court explained in *Richards*, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." 517 U.S. at 798 (citing Restatement (Second) of Judgments, ch. 4 ("Restatement")); *see also Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 436-437 (1934) (privity doctrine may be used to enjoin "persons not technically agents or employees" from aiding a defendant in performing a prohibited act).

The question whether the relationship between a party and a non-party is "close enough" to bring the second litigant within the judgment—and thus to give rise to privity—has been posed in dozens upon dozens of cases, all presenting their own variations on a number of factual themes. *See Kourtis* v. *Cameron*, 419 F.3d 989, 996 (9th Cir. 2005) (noting that courts have found privity "in an array of disparate circumstances"); Restatement §§ 34-63 (setting forth in 30 sections principles of non-party preclusion); *see also* Wright & Miller § 4449, at 330 (noting "the myriad rules that define the circumstances in which nonparties can be bound"). The sheer number and variety of cases presenting a non-party-preclusion issue have led this Court and the lower courts to resist rigid categorization of circumstances giving rise to preclusion. Instead, this Court and others have emphasized that privity "turns on the facts of particular cases." *Coryell* v. *Phipps*, 317 U.S. 406, 411 (1943); *see Tyus*, 93 F.3d at 455 (characterizing inquiry as "fact-intensive").

This heavily fact-driven inquiry is an equitable one as well. *See Tyus*, 93 F.3d at 455; *Gonzales*, 27 F.3d at 761 (privity is "an equitable theory, [not] a crisp rule with sharp corners and clear factual predicates"). As this Court explained in *Blonder-Tongue*, a case involving the related preclusion doctrine of collateral estoppel, "no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, [the] decision will necessarily rest on the trial courts' sense of justice and equity." 402 U.S. at 333-334; *cf. Zedner* v. *United States*, 547 U.S. 489, 504 (2006) (observing that doctrine of judicial estoppel "is equitable and thus cannot be reduced to

a precise formula or test"). As it should. After all, " 'the achievement of substantial justice * * * is the measure of the fairness of the rules of res judicata,' " *Blonder-Tongue*, 402 U.S. at 325 (quoting *Bruszewski*, 181 F.2d at 421), and the scenarios that give rise to findings of non-party preclusion have proven to be so diverse as to render fixed requirements both unworkable and unwise. *See Gonzalez*, 27 F.3d at 761 (due to "variegated" cases, privity law is "resistant to * * * a single elegant limiting principle of the 'one size fits all' variety").

3. In an era of crowded dockets and costly litigation, a pragmatic approach to privity permits courts to apply res judicata against parties who—though they lacked a formal legal relationship to the litigants in earlier cases—are relitigating the same case they have effectively already prosecuted (and lost). In *Montana*, for example, a federal contractor brought suit challenging the constitutionality of a Montana tax. 440 U.S. at 151. The United States was not a party to the case, but it financed the litigation and controlled many of the contractor's tactical decisions. *Id.* at 155. The first suit failed; the United States then pursued a separate suit challenging the same tax. *Id.* at 151. This Court held that preclusion barred the second case: the United States may have been a non-party to the first case, but it could not relitigate the matter where it had "exercised control" over the prior litigation. *Id.* at 154-155. The Court emphasized that the same reasons why the common law precludes parties from contesting matters that have been fully and fairly litigated—"protect[ing] their adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] re-

liance on judicial action by minimizing the possibility of inconsistent decisions"—are "similarly implicated when nonparties assume control over litigation." *Id.* at 153-154; *see also* Restatement § 39.

A pragmatic, case-by-case approach to privity similarly allows courts to identify and weed out lawsuits that functionally relitigate against one entity claims that were already resolved against another—even when the second defendant is legally a separate entity from the first. In *Lubrizol Corp.* v. *Exxon Corp.*, 929 F.2d 960 (3d Cir. 1991), for example, the Third Circuit held that res judicata barred a second action against a wholly-owned subsidiary of a party to the first action. Despite the established principle that parent and subsidiary are legally separate entities, *see Mellon Bank, N.A.* v. *Metro Commc'ns, Inc.*, 945 F.2d 635, 643 (3d Cir. 1991), *cert. denied*, 503 U.S. 937 (1992), the *Lubrizol* court found that for purposes of the dispute at issue in the case, "a close and significant relationship" existed between the two that warranted barring the plaintiff's second action. 929 F.2d at 966.[12]

It was irrelevant that the nonparty in *Montana* lacked a formal legal relationship with its litigation proxy; and it was irrelevant that the subsidiary in *Lubrizol* was legally separate from its parent. What matters under the modern approach to privity is not formalism but fairness and common sense. Consistent with that view, the lower federal appeals courts treat the privity analysis as a "functional" inquiry,

---

[12] Other courts have reached the same result when presented with analogous facts. *See, e.g., Mars Inc.* v. *Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616, 618-619 (Fed. Cir. 1995); *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985).

one posing the "fact-specific" question "whether there was (or should be implied at law) the kind of link between the earlier and later plaintiffs that justifies binding the second group to the result reached against the first." *Tice* v. *American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998), *cert. denied*, 527 U.S. 1036 (1999); *see also Chase Manhattan Bank, N.A.* v. *Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995) (privity analysis is "functional").

By treating privity as a "flexible concept dependent on the particular relationship between the parties in each individual set of cases," *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-82 (9th Cir. 2003), the federal courts have retained for themselves an important, if seldom-used, tool: the power to dismiss certain types of vexatious litigation at the outset. As a number of lower federal courts have observed, a "mechanical" approach to preclusion requiring a formal legal relationship between litigants unacceptably "opens the door to countless varieties of manipulation, including claim-splitting, suits by proxy, and forum-shopping." *Gonzalez*, 27 F.3d at 757. Accordingly, in narrow circumstances courts have precluded non-parties whom they perceived as "unfairly * * * exploit[ing] technical nonparty status in order to obtain multiple bites at the litigatory apple." *Id.* at 761.[13]

---

[13] *See, e.g., Jaffree* v. *Wallace*, 837 F.2d 1461 (11th Cir. 1988); *Petit* v. *City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991); *Crane* v. *Commissioner of Dep't of Ag., Food & Natural Res.*, 602 F. Supp. 280 (D. Me. 1985); *Garcia* v. *Wilson*, 820 P.2d 964 (Wash. Ct. App. 1991); *Ramos* v. *Horton*, 456 S.W.2d 565 (Tex. App. 1970).

This functional approach to privity—which looks behind the case caption and the parties' formal legal relationships—is an important means of advancing "the defendant's interest in avoiding the burdens of twice defending a suit" and "avoid[ing] * * * unnecessary judicial waste." *Arizona* v. *California*, 530 U.S. 392, 412 (2000) (quotation omitted). To be sure, "there are clearly constitutional limits on the 'privity' exception." *Richards*, 517 U.S. at 798. But this Court need not and should not adopt a rigid categorical rule to police those limits. Instead, it should—as it does whenever equity is in play—endorse a test that carefully maps out the metes and bounds that fence the lower courts' analysis. That approach will "prevent preclusion when the relationship between the party and non-party becomes too attenuated," *Southwest Airlines Co.* v. *Texas Int'l Airlines, Inc.* 546 F.2d 84, 95 (5th Cir. 1977), but still promote judicial economy and spare defendants from "the expense and vexation attending multiple lawsuits," *Montana*, 440 U.S. at 153, when the relationship is so close and the parties' interests so aligned that they should be treated as one.

4. The D.C. Circuit in this case took precisely that tack. It explained that privity is resistant to " 'any precise definition of general applicability,' " Pet. App. 5a (quoting *Jefferson Sch.*, 331 F.2d at 83), and that its analysis therefore had to be " 'equitable and fact-intensive.' " *Id.* at 7a (quoting *Tyus*, 93 F.3d at 455). Having acknowledged this settled principle, the court sensibly did not then attempt to articulate a test that would function as a blunt instrument. It instead undertook a number of inquiries—common in the case law, and which the parties "generally agree[d] * * * are appropriate factors to consider,"

Pet. App. 9a—designed to test whether Taylor's interests had already been pressed and protected in Herrick's action. The court required a showing of identical interests, adequate representation, *and* at least one of "a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.* at 8a. And after articulating this demanding test, the Court of Appeals applied it narrowly, with precision and care, reaching only those conclusions firmly supported by the factual record before it.

As to "identical interests," the Court of Appeals did not just require that Taylor have a similar interest as Herrick in the sense that both sought "release of the F-45 documents." Pet. App. 9a. Such an inquiry arguably would be too broad, sweeping up (for example) separate FOIA requesters interested in the same documents for separate purposes. Instead, the court required that Taylor essentially possess *Herrick*'s interest for this particular inquiry to be satisfied, and based on the record facts, the court found that to be so: both Taylor and Herrick wanted the documents to restore Herrick's plane. *See id.* at 10a (pointing to evidence that Taylor and Herrick had "the same motivation to obtain the documents, viz., the restoration of Herrick's F-45"). The court's identity-of-interests inquiry was satisfied on this record because the two shared the exact same interest—Herrick's—not just in obtaining the documents, but "even when viewed in terms of incentives." *Id.* at 17a; *see also Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996) (privity attaches "when there is a practical identity of interests

between the former litigant and the present one"). The Court of Appeals' "identity of interests" inquiry was thus quite constrained. It required a mapping-on of interests that is rare in practice, and that arguably existed here in part because Taylor's right of suit was of a peculiar sort—a non-monetary and universal cause of action bestowed by statute—that made suit-by-proxy possible. *See infra* at 11 (discussing the nature of Taylor's interest).

Second, as to whether the litigants' shared interest in restoring Herrick's plane had been adequately represented once already, the court did not find it sufficient that Herrick had as much incentive as Taylor to litigate his claim "zealously." The court instead found its "adequate representation" inquiry satisfied when an additional fact—Taylor's use of the same attorney—was added to the mix, "strongly suggest[ing] satisfaction with the attorney's performance in the prior case." *Id.* at 14a.

Next, as to "close relationship," the D.C. Circuit did not find it sufficient that Taylor and Herrick merely belonged to the same association and shared an interest in old airplanes. Pet. App. 15a. On the contrary, the court ticked off a list of facts that, taken together, supported the privity finding: "Herrick asked Taylor to assist him in restoring his F-45, provided information to Taylor that Herrick had obtained through discovery, and at summary judgment Taylor did not oppose Fairchild's characterization of Herrick as his 'close associate.'" *Id.* at 15a-16a.

The court emphasized that Taylor and Herrick shared not just a close relationship in the abstract but "a close working relationship relative to these

successive cases." *Id.* at 17a. The court also noted that, though the facts were ambiguous, they suggested collusion to retry Herrick's case: among other things, Taylor had filed his FOIA request "almost immediately" after Herrick's case ended and had used Herrick's lawyer. *Id.* at 16a. In light of all the facts, and Taylor's failure to submit "countervailing evidence," the Court of Appeals found its "close relationship" inquiry to support a finding of privity. *Id.*

The court had by this point made quite clear that it would not have found privity if Taylor and Herrick had merely wanted the same documents, belonged to the same association, and known each other. But if there were any doubt, the court resolved it by explaining that the additional facts recounted above were central to its result: "Matters might look different if Taylor had submitted evidence before summary judgment * * * demonstrating [that his] relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations." *Id.* at 18a. But Taylor did no such thing. Matters likewise "might look different" had Taylor submitted evidence refuting the idea that Herrick had "suggested" or offered to help with Taylor's claim. *Id.* Again, he did no such thing. Because all of those unrebutted facts undergirded the court's holding, the case simply "d[id] not implicate" the concern that friends, acquaintances, fellow hobbyists, or members of the FOIA bar would find themselves later to be bound by each other's litigation. *Id.*

5. The D.C. Circuit's opinion thus stands for an appropriately narrow proposition: Where a party opponent in a subsequent litigation musters facts

showing that successive litigants share identical interests, identical incentives, and "a close working relationship relative to the[ ] successive cases," the burden shifts to the second litigant to submit evidence refuting the charge. If the second litigant comes forward with such evidence that his interests are independent or his claim was not adequately pressed by the first, he may proceed. *See Headwaters Inc.* v. *U.S. Forest Serv.*, 399 F.3d 1047, 1050 (9th Cir. 2005) (reversing privity finding because district court failed to give subsequent plaintiffs "an opportunity to demonstrate" that they were not in privity with prior plaintiff). But if he cannot muster that limited rebuttal—as Taylor could not—the game is up.[14]

The approach the D.C. Circuit adopted conforms to this Court's teachings on res judicata. Declining to nail down a "precise definition" of privity, Pet. App. 5a—a task courts for decades appropriately have declined—the Court of Appeals conducted a detailed, record-based, "equitable and fact-intensive" analysis, *Tyus*, 93 F.3d at 455, concluding that on these facts and in this case, preclusion was warranted and was fair. The D.C. Circuit's approach appropriately constrained the privity inquiry while providing

---

[14] This approach makes sense whether deemed a burden shift or an adverse inference. As to the former, it is unlikely an opposing party will have access to direct evidence of collusion, and the burden therefore belongs upon the successive litigant to at least deny collusion under oath. *See United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002) (noting "the general rule that burdens shift to those with peculiar knowledge of the relevant facts"). As to the latter, "[s]ilence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153-154 (1923) (Brandeis, J.).

sufficient flexibility to capture cases where two parties, though legally separate, are functionally one.

II. TAYLOR'S "LEGAL RELATIONSHIP" THEORY IS AT ODDS WITH THE LAW AND IS NOT REQUIRED BY DUE PROCESS.

Taylor rejects the established notion that privity is a necessarily flexible and fact-driven inquiry. Instead he argues that a "legal relationship" between the parties alleged to be privies must exist in every case of non-party preclusion. Pet. Br. 8. This proposition is demonstrably incorrect as a matter of preclusion law; nor can it be justified by an appeal to due process.

A. The "Legal Relationship" Theory Cannot Be Reconciled With Res Judicata Law.

Taylor asserts that a "relationship of legal accountability" must exist between a non-party and a party to a judgment in order for the non-party to be bound. Pet. Br. 14. Indeed, he goes a step further and asserts that "[b]ecause the non-party's interests must be protected during the party's case, * * * and because the party must have assumed the power of representing the non-party in *that case*, the relationship of legal accountability between the party and non-party must exist at the time of the case." *Id.* (emphasis in original). There are three problems with Taylor's argument. It cannot be squared with existing preclusion law; it is at odds with this Court's cases; and it is contradicted by his own *amici*.

1. Although a legal relationship may in some circumstances be *sufficient* to support a finding of privity, this Court has never held that it is

necessary.[15] For example, in *Montana*, discussed *supra* at 21-22, this Court held that a non-party was precluded from pursuing a second action where it had "exercised control" over a party to the first action. *See Montana*, 440 U.S. at 154-155; *see also* Restatement § 39. And there is no suggestion in *Montana* that the parties had a "legal relationship" forming the basis for the preclusion funding.

Taylor attempts to reconcile this opinion with his argument by contending that the controlling entity in cases like *Montana* actually *is* a "party." *See* Pet. Br. 26. But the *Montana* Court made clear that the non-party in the first case did not morph into a party by virtue of its behind-the-scenes involvement in that case. The Court referred to the United States three times as a "nonpart[y]," *Montana*, 440 U.S. at 154-155, and concluded that "*although not a party*, the United States plainly had a sufficient 'laboring oar' " in the first case "to actuate principles of estoppel." *Id.* at 155 (quoting *Drummond* v. *United States*, 324 U.S. 316, 318 (1945)) (emphasis added). The Restatement is to the same effect. *See* Restatement § 39 ("A person who is not a party to an action" may be bound under the control principle); *id.* § 34 cmt. a ("A person becomes a party to an action by being designated as such and becoming subject to the jurisdiction of the court."). Taylor's "legal relationship" framework cannot be squared with this branch of non-party preclusion law.

---

[15] Indeed, in some circumstances it may not even be sufficient—the court still may need to ensure that the second party has identical interests and was adequately represented. *See* Restatement § 42(1)(e).

A non-party also may be precluded by a judgment when (i) he has a claim arising from the transaction at issue in the case, (ii) he induces the defendant to believe he will not assert that claim separately from the current plaintiff, and (iii) his act causes the defendant not to join him to the action. Restatement § 62; *see, e.g.*, *Casa Marie, Inc.* v. *Superior Court*, 988 F.2d 252, 266 (1st Cir. 1993) (panel including Breyer, J., citing Section 62 with approval). This principle, reflected in many cases[16] and cited approvingly by the treatises,[17] does not require a legal relationship between the non-party and a party to the first case in order to justify preclusion. Indeed, Section 62 is quite clear on this point: It notes that non-party preclusion is permissible in several broadly defined circumstances, including (a) where the non-party "stand[s] in one of a variety of pre-existing legal relationships with a party" *and* (b) where the non-party "is involved with [the first case] in a way that falls short of becoming a party but which justly should result in his being denied opportunity to relitigate the matters previously in issue." Restatement § 62 cmt. a. This statement cannot be reconciled with Taylor's claim that in preclusion law, only a legal relationship will do.

Finally, and most important here, courts have found privity to exist among parties who did not share a formal legal relationship in order to avoid "countless varieties of manipulation, including claim-splitting, suits by proxy, and forum-shopping."

---

[16] *See* Restatement § 62 Reporter's Note (citing 20 cases that apply Section 62's approach or reach the same result on related grounds).

[17] *See, e.g.*, Wright & Miller § 4453, at 427.

Gonzalez, 27 F.3d at 757; *see supra* at 23. This line of cases, like those discussed above, does not require a "legal relationship" between the non-party and a party to the judgment—much less one cemented at the time of the first case, as Taylor urges. Such a temporal requirement would make no sense in plaintiff-recruitment cases, where the collusive action justifying estoppel may well occur after the conclusion of case number one.[18]

2. Taylor makes no attempt to reconcile any of these precedents with his argument. He instead seeks to extract his "legal relationship" theory from a carefully culled handful of this Court's cases. But none of the cases he cites actually announced any such "legal relationship" requirement, and some in fact affirmatively undercut his proposition.

First, Taylor's "legal relationship" argument relies heavily on cases establishing the general proposition that a judgment cannot bind "a litigant who was not a party or a privy." Pet. Br. 9-10, 15 (quoting *Parklane Hosiery Co.*, 439 U.S. at 327 n.7; *Richards*, 517 U.S. at 797; *Hansberry* v. *Lee*, 311 U.S. 32 (1940); and *Blonder-Tongue*, 402 U.S. 313). We have

---

[18] Petitioner's unsupported the[illegible]lationship-had-to-exist-at-the-time-of-the-first-lawsuit rule would lead to absurd results. Imagine, for example, a corporation that unsuccessfully prosecutes a FOIA request. A week after that litigation concludes, the corporation charters a wholly owned subsidiary—controlled and dominated by the parent's directors—which then brings a FOIA action of its own seeking the same documents that its parent sought. Few would dispute that privity would exist and that res judicata should bar such an overt bid for the litigation equivalent of a mulligan. Yet the rigid rule Taylor presses would sanction exactly that outcome.

no quarrel with that proposition. But it only begs the operative question here: what is a "privy"?

Taylor also purports to find a categorical "legal relationship" requirement in *Richards*. But *Richards* makes exactly the opposite point. There, this Court observed that under the classical test for privity, only a handful of well-defined legal relationships once sufficed. As examples of those traditional relationships, this Court explained that "a judgment that is binding on a guardian or trustee may also bind the ward of the beneficiaries of a trust." *Richards*, 517 U.S. at 798. But the Court then emphasized that this strict limitation is no longer good law: "[T]he term 'privity' is now used to describe various relationships between litigants that *would not have come within the traditional definition of that term*." *Id.* (emphasis added).

Taylor concedes that this Court in *Richards* acknowledged that the concept of privity is no longer cabined by the " 'traditional definition of that term.' " Pet. Br. 15 (quoting *Richards*, 517 U.S. at 798). But as Taylor sees things, "[e]ven this expanded concept of privity * * * requires a legal relationship between the party and the non-party." *Id.* The problem is that the only "example[s] of privity" Taylor cites for this proposition are the guardian-ward and trustee-beneficiary relationships this Court used to describe privity as it once was defined—not its modern expanded definition. *Richards*, 517 U.S. at 798.[19]

---

[19] One of Taylor's *amici*, attempting to support Taylor's argument about the meaning of *Richards*, resorts to inverting the order of this Court's discussion. *See* Brief for Lavonna Eddy and Kathy Lander as Amici Curiae ("Eddy Br.") 15 (quoting

Taylor also argues that *Richards* "cited to chapter four of the Restatement," and that "Section 41, in that chapter, lists relationships that cause a person to be 'represented by a party' "; thus, he concludes, "common-law preclusion principles forbid the application of res judicata in this case." Pet. Br. 15-16. What Taylor neglects to mention is that Restatement Chapter Four contains *thirty* sections (§§ 34-63), a number of which endorse non-party preclusion in circumstances where a legal relationship is absent. *See, e.g.*, Restatement § 39 (control); *id.* § 62 (estoppel by conduct). The Restatement cannot fairly be read as limiting non-party preclusion to "legal representation" scenarios.

Finally, Taylor quotes *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160 (1999), for the proposition that "[t]he party and non-party must share a 'special *representational* relationship.' " Pet. Br. 13 (quoting *South Cent. Bell*, 526 U.S. at 168) (emphasis in petitioner's brief). According to Taylor, this quote established in every case a requirement of a formal, *ex ante* "*legal* relationship." But *South Central Bell* did not employ Taylor's favored term, nor did it engage in any discussion that would suggest a formal legal-relationship requirement of the type he posits. Quite the contrary, in fact: the Court made clear in *South Central Bell* that it was envisioning its unexplained "special representational relationship" as only one among several ways a non-party could be bound. It wrote that "no one claims that there is *'privity' or some other special relationship*" between the party and non-party. 526

---

first *Richards*' sentence about expanding notions of privity and then its sentence about "guardian[s] or trustee[s]").

U.S. at 167-168 (emphasis added). And in any event, the *South Central Bell* Court did not purport to disturb the holdings of *Montana* or *Richards*—two cases that similarly cannot be squared with a "legal representation" requirement.

3. The flimsiness of petitioner's "legal relationship" argument is underscored by the fact that his own *amici* contradict it. The Eddy Brief, for example, argues that privity may be found in three disjunctive situations: (i) "legal responsibility of one individual for another," (ii) actual control over another's litigation, or (iii) where "the rule of necessity" counsels in favor of preclusion. Eddy Br. 14. The brief thus recognizes that a "legal relationship" of the sort petitioner posits is not a categorical requirement of non-party preclusion.[20] *See also* Brief of Civil Procedure and Complex Litigation Professors as *Amici Curiae* ("Professors' Br.") 3-5 (arguing that non-parties may be precluded in class actions, control cases, legal-relationship cases, or cases involving a specialized statutory scheme).

B. Due Process Does Not Impose A "Legal Relationship" Requirement.

Taylor's petition for certiorari suggested that his "legal relationship" rule was mandated by the Due Process Clause. *See* Pet. i. On brief now, Taylor shies away from due process, suggesting instead that the question can be resolved as a matter of common-

---

[20] The Eddy brief also contradicts Taylor's argument (discussed *supra* at 30) that *Montana* is not a non-party preclusion case. And its ill-explained "necessity" category appears broad enough to embrace many instances in which it would be equitable to impose preclusion—thus supporting the notion that privity is a fact-driven, flexible inquiry.

law doctrine. *See, e.g.*, Pet. Br. i; Professors' Br. 3 n.2; Eddy Br. 27. To the extent Taylor continues to make a due-process argument, the argument should be rejected.

1. Here, as in the common-law context, Taylor cherry-picks broad statements from this Court without acknowledging their limitations. He points out, for example, that "because non-parties 'never had a chance to present their evidence and arguments on the claim, [due] process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." Pet. Br. 10 (internal citation omitted) (quoting *Blonder-Tongue*, 402 U.S. at 325). Not given such prominent billing is *Richards*' caveat to that statement: "Of course, these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." 517 U.S. at 798. The constitutional question, like the common-law question, thus boils down to privity's permissible scope.

The answer to that question, in turn, is informed by *Richards*. *Richards* was decided as a due-process case, not a common-law preclusion case, *see* 517 U.S. at 802, and yet as discussed above, *Richards* both suggested that privity had expanded beyond formal legal relationships *and* cited with approval portions of the Restatement that permit non-party preclusion absent legal relationships. *Richards*, 517 U.S. at 798; *see supra* at 33-34. Thus, while "there are clearly constitutional limits on the 'privity' excep-

tion," *id.*, the *Richards* Court did not consider a categorical "legal relationship" requirement to be among them.

2. Nor would such a requirement make sense in the larger context of due-process jurisprudence. Much like the privity inquiry itself, any inquiry into what satisfies due process in a particular case is "flexible"; it calls only "'for such procedural protections as the particular situation demands.'" *Wilkinson* v. *Austin*, 545 U.S. 209, 225 (2005) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). And just as with privity analysis, this Court "generally ha[s] declined to establish rigid rules" governing the due process inquiry. *Id.*; *see also Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"). As a result, the process that is due is influenced by the nature of the loss claimed. *See Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

Taylor's proposed categorical "legal representation" requirement is a poor fit with this settled conception of due process as flexible and informed by the situation at hand. In some cases, due-process balancing might well require the conclusion that the nonparty should not be bound absent a formal legal relationship with a party to the earlier case. But the due-process balancing in which courts regularly engage need not call for such a requirement in *all* cases (nor, conversely, may a formal legal relationship *alone* necessarily satisfy due process).

Where, for example, a plaintiff controlled a previous case that resolved the same issues, or where a court receives unrebutted evidence of plaintiff recruitment or suit-by-proxy, or where a defendant detrimentally relied on a non-party's behavior, the court acts within constitutional bounds if it examines the non-party's interest and concludes that it is outweighed by the "vital public interests" served by res judicata, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981), even absent a "legal relationship."

3. Taylor's contrary argument relies heavily on the notion that non-party preclusion must be based on "adequate representation." Pet. Br. 11-12. He looks to two Supreme Court cases that have discussed adequate representation—*Hansberry* and *Richards*—and asserts their proposition that "a prior proceeding, to have binding effect on absent parties, would at least have to be so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." Pet. Br. 12 (quoting *Richards*, 517 U.S. at 801) (quotation marks omitted). From that principle, in turn, Taylor jumps to the notion that a "legal relationship" must be required to impose non-party preclusion in every case.

The trouble with Taylor's argument is the trouble with his conception of due process generally: He treats the doctrine as if the process requirements applicable to one sort of case are uncritically transferable to others. But that is not how it works. *See Cafeteria & Rest. Workers*, 367 U.S. at 895; *Goldberg*, 397 U.S. at 262-263. *Hansberry* and *Richards* speak to the process that is due in one type

of case—one where there is no little or no connection between the parties and non-parties except for their similar claims. *See Hansberry*, 311 U.S. at 44-45 (noting absence of connection and sharp divergence of interests between the two sets of parties); *Richards*, 517 U.S. at 800-802 (no apparent connection between the two sets of plaintiffs and partially divergent interests); *Wilks*, 490 U.S. 755 (no apparent connection between the two sets of parties). In that circumstance, a court may sensibly refuse to preclude a non-party absent evidence that well-defined procedures were used in the first case to protect the non-party's interests.

But it does not follow from *Hansberry* and *Richards* that the same requirements apply across the board. In other sorts of cases where non-party preclusion traditionally has been applied—for instance, cases of apparent authority,[21] or cases where the non-party is acting as the collusive proxy of an earlier litigant—the concerns identified by *Hansberry* (involving two sets of litigants with *diametrically opposed* interests) and *Richards* (where the two sets of litigants had no apparent connection to each other) have no resonance. And there is no suggestion in either case that the Court silently declared other well-established lines of res judicata law unconstitutional. On the contrary, *Richards* acknowledged that pure adequate-representation cases are but one species of non-party preclusion law: the Court wrote that (i) traditional property-based notions of privity constitute one exception to the "only parties are bound" rule; (ii), modern, expanded notions of privity

---

[21] *See Fleming* v. *Cooper*, 284 S.W.2d 857 (Ark. 1955); Wright & Miller § 4453, at 424-426.

constitute another such exception; and (iii) "*in addition*, '[w]e have recognized an exception to the general rule when * * * a person, although not a party, has his interests adequately represented.'" *Richards*, 517 U.S. at 798 (quoting *Martin*, 490 U.S. at 762 n.2). *Richards* should be taken at its word; the protections it imposed should not be imported and applied far afield from the particular circumstances in play there.

It is one thing, in short, to say the Due Process Clause requires full class-action protections when unrelated parties are to be estopped on the basis of "adequate representation" alone. It would be quite another to require those same protections in a case where the party and non-party have identical interests, know each other "quite well," share an attorney, give each other access to discovery materials, refer to one another in their pleadings, enjoy a "close working relationship relative to the[ ] successive cases," Pet. App. 17a, and engage in timing and tactics that suggest coordinated filing designed to "exploit technical nonparty status in order to obtain multiple bites of the litigatory apple.'" *Gonzalez*, 27 F.3d at 761. The factual differences between this case on the one hand, and *Hansberry* and *Richards* on the other, are stark. And when it comes to due process, facts matter. *See Cafeteria & Rest. Workers*, 367 U.S. at 895. The D.C. Circuit's decision below was motivated by, and limited to, the peculiar facts presented. It did not confront the very different facts of an "adequate representation" case, and for that reason it does not threaten to turn Herrick's case into a "de facto class action." Pet. Br. 17. Taylor's due process argument should be rejected.

III. TAYLOR'S "NOTICE" THEORY ALSO IS WITHOUT BASIS.

In a few pages at the close of his brief, Taylor argues in the alternative that even if "legal relationship" is not a categorical requirement of non-party preclusion, actual notice of the first case must be. Pet. Br. 33-36.[22] But that, too, is wrong.

The general proposition undergirding Taylor's argument is that notice and a "right to be heard is '[t]he fundamental requisite of due process.' " Pet. Br. 33 (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The D.C. Circuit readily acknowledged as much, Pet. App. 12a (citing *Richards*, 517 U.S. at 799-800), and this "requisite of due process" is borne out by the D.C. Circuit's fact-specific, equitable test for privity itself. The Court of Appeals declared that privity attaches where two parties are united by the same interest, their interests were adequately represented in the first litigation, and the two parties share a particularly close relationship with respect to the second litigation or collude to relitigate the first lawsuit. *See supra* at 13-16. The D.C. Circuit's test, in short, applies res judicata only where—as a practical matter—the two parties function as one.

And where two parties are so closely aligned that they are treated as one and the same, no separate inquiry into notice is needed. Thus, if a trustee unsuccessfully brings suit, his trustor is barred from

---

[22] By arguing that an acceptable substitute exists for the "legal relationship" requirement on which he spends the bulk of his brief, Taylor goes far toward accepting *respondents'* position on privity: *i.e.*, that there is more than one way to test for it.

relitigating the claim—regardless of whether the trustor received actual notice of the first lawsuit. Where the parties share a close relationship unified by a common litigation goal, the second party effectively receives "constructive notice of all ensuing litigation." *Gonzalez*, 27 F.3d at 761 n.11.

Even Taylor grudgingly concedes that, with certain relationships, "notice of the lawsuit can be imputed" to a later litigant. Pet. Br. 35. He hedges that concession, of course, insisting that imputation of notice is proper only "when someone has a legal relationship with another person." *Id.* But we have already demonstrated how this Court and others have refused to confine privity to strict "legal" relationships. *See supra* at 29-35. Under Taylor's circular reasoning, it would be impossible to extend privity to non-legal relationships because constitutionally adequate notice could be imputed to the parties only if they first shared a legal relationship. That is not a rule this Court should endorse; not only is it illogical, but it would leave courts powerless to identify and pretermit collusive second (and third, and fourth) lawsuits pressing identical interests for identical reasons. *See* Pet. App. 12a; *see also supra* at 23; *Gonzales*, 27 F.3d at 761 ("actual or constructive notice" is "implicit" in tactical maneuvering scenario).

Imputing notice to a subsequent litigant who fails to rebut evidence of a "close relationship" relative to the first case is particularly appropriate where—as here—the litigant's interest is not in his livelihood, or his personal property, or his civil rights, or in money damages, but in a non-monetary "informational" cause of action bestowed by statute on

every citizen of the United States.[23] This Court has long recognized that property interests are not all of a kind. *Goldberg*, 397 U.S. at 263-264; *see also Sniadach* v. *Family Fin. Corp. of Bay View*, 395 U.S. 337, 340 (1969). A court in a preclusion case therefore quite reasonably may consider the nature of the right together with other facts and conclude that process was satisfied by imputed notice. Taylor's categorical notice rule should be rejected in favor of the D.C. Circuit's careful and limited case-by-case approach, which properly acknowledged notice as an important factor in the privity inquiry.

IV. POLICY CONSIDERATIONS FAVOR AFFIRMANCE.

1. The D.C. Circuit's privity test has two clear advantages over the rule (or rules) Taylor has proposed. First, it does not impose categorical directives across the spectrum of res-judicata law. To do so would be both unprecedented and ill-advised given the proven diversity and unpredictability of the

---

[23] Taylor's FOIA right is not, as Taylor and some of his *amici* suggest, a "chose in action." Pet. Br. 32; Eddy Br 10. Choses in action are legal claims that involve the right to recover money or tangible goods; they are transferable and assignable. *See Black's Law Dictionary* 258 (8th ed. 2004) (defining "chose in action" as "[a] proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort"); *Blagge* v. *Balch*, 162 U.S. 439, 459 (1896) (noting that a claim was "transferable and transmissible like other property of the nature of choses in action"); 12 U.S.C. § 632 (defining "property" to include, inter alia, "gold, silver, currency, * * * [and] choses in action"). Taylor's statutory right of suit bears little resemblance to such interests. It is not an "in personam" right, it does not carry with it potential damages, and it is not transferable—anyone to whom it might be transferred already possesses it.

fact patterns in this area of law; far better to adopt, as the Court of Appeals did here, a flexible test that can be applied on a case-by-case basis. Trial courts are naturally equipped to gather and declare the facts giving rise to privity, and because they review res judicata decisions *de novo*, *see* Pet. App. 5a, courts of appeal for their part can ensure that litigants are not too hastily denied their day in court.

Second, the D.C. Circuit's test provides district courts with the tools they need to reject plaintiff recruitment, suit-by-proxy, and other inequitable litigation conduct in those rare cases when problems arise. Taylor's theory, by contrast (and perhaps by design), would render it impossible to kick such suits out of court: Estoppel-by-conduct cases would not necessarily meet Taylor's requirements, and efforts to dismiss plaintiff-recruitment cases would often founder on the legal-relationship requirement or the notice requirement or both.

Indeed, Taylor's rule would be particularly troublesome in "public law" cases such as this one, involving universal rights of suit. In private-law cases, an alert defendant may be able to join in one action all potential plaintiffs and thus obviate the potential for successive suits. Not so in this context. In cases involving FOIA and similar public rights, potential plaintiffs include the entire adult population of the United States. A defendant or intervenor such as Fairchild thus may be called on in case after successive case to protect from disclosure confidential commercial documentation it was required by federal law to file.[24] Preclusion law must have

---

[24] If one plaintiff loses an action such as this, moreover, it can recruit another, and another, and another—until just one

sufficient room for play in the joints to accommodate these circumstances, and district courts must be permitted to identify and dispose of such claims when there has been untoward manipulation of the courts—and no evidence is offered to countermand that suspicion.

2. Taylor and his *amici* offer several arguments about the purported perils of the D.C. Circuit's test, but none has merit. They argue that it could preclude successive litigants just because they "share[ ] a hobby," Pet. Br. 21, or because they share membership in the same association, *see* Professors' Br. 10, or because they are members of the FOIA bar who often work together and whose separate groups happen to seek the same documents, *see* Brief of *Amici Curiae* The National Security Archive *et al.* 4. But as another of petitioner's own *amici* correctly points out, those concerns are unfounded: "the court was careful to limit its holding to the specific facts presented" and "it did not base its conclusion on the two men's membership in the [same association]." Brief of *Amicus Curiae* American Dental Association 6. The "specific facts presented" included not just associational membership and shared interest in the documents, but *identical* (and indeed derivative) interests, identical motivation, use of the same counsel and discovery materials, suspicious timing, accusations of suit-by-proxy, and failure to rebut those accusations. The D.C. Circuit's holding thus would not justify preclusion in any of the scenarios

---

plaintiff *wins*, at which point Fairchild's documents become the public's. There are no do-overs on the defense side.

presented by the *amici*.[25] *Cf. Burnham* v. *Superior Court*, 495 U.S. 604, 613 n.2 (1990) (plurality op.) (noting that the bases on which a judgment relies are not dicta).

Taylor and his *amici* also argue that the D.C. Circuit's test essentially requires widespread mandatory intervention. *See* Pet. Br. 29; Eddy Br. 8-9. That is simply not so. The D.C. Circuit fashioned a test that will affect only the rare successive plaintiff with interests so indistinguishable from the first that he can properly be deemed a proxy. And in the situations where the D.C. Circuit's test is most likely to be of use—instances of plaintiff recruitment or other *post hoc* collusion—the successive plaintiff may not have known about the first case at all. To speak of a "mandatory intervention" requirement in that context makes no sense.

Taylor also argues that the D.C. Circuit's approach would encourage "races to the courthouse, as people try to make sure that their case is the one resolving their rights." Pet. Br. 29. That too is incorrect, for

---

[25] This includes *Eddy* v. *Waffle House*, No. 07-495. The *Eddy* petitioners sued Waffle House for violation of their civil rights, were *improperly dismissed* from the case, and subsequently were held precluded by a jury verdict adverse to another plaintiff whose suit had proceeded to trial. Eddy Br. 2. That sort of "whipsawing placed appellants in an untenable position," and as a result the privity doctrine "cannot be galvanized to preclude [them] from maintaining their suit." *Gonzalez*, 27 F.3d at 763. This Court repeatedly has observed that the doctrine has sufficient equitable flexibility to preserve the claims of plaintiffs wrongly pretermitted from a proceeding; those plaintiffs never got a first bite at the "litigatory apple," and thus are not asking for seconds. *See Montana*, 440 U.S. at 155; *Blonder-Tongue*, 402 U.S. at 333-334; *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948).

the reasons just discussed. The D.C. Circuit's test would not ensnare mere friends or colleagues; nor would it threaten victims of mass torts with preclusion for electing to sue separately; nor would it adversely affect civil-rights plaintiffs like the *Eddy* petitioners. It is much more narrowly drawn, and was much more exactingly applied, than that.

Finally, *amici* argue that the D.C. Circuit's test would create new pleading burdens in the federal courts, with defendants often seeking judgment and discovery before judgment on non-party-preclusion grounds and the courts forced to sort out the facts. *See* Professors' Br. 16. But the court's functional test hardly threatens to inundate the district courts with widespread non-party-preclusion pleading. And even the position Taylor presses here requires the threshold resolution of preclusion issues in certain narrow circumstances—for example, whether two successive plaintiffs have a "legal relationship," when they developed such a relationship, when the second plaintiff received notice of the first suit, and so forth.

* * *

Res judicata is "a rule of fundamental and substantial justice, of public policy and private peace." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). Its application "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana*, 440 U.S. at 153. And its careful use when the equities demand it—in addition to conserving judicial resources often tested to their limits—relieves defendants from the needless "expense and vexation" of defending the

same suit again and again. *Id.* As the party with business interests at stake in this case—and which now has been hauled into five courts by two confederates pressing identical claims for identical reasons—Fairchild can speak with authority to the "expense and vexation" attending such claims. *Id.*

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

EMILY M. YINGER
N. THOMAS CONNALLY
MICHAEL M. SMITH
HOGAN & HARTSON LLP
8300 Greensboro Drive
Suite 1100
McLean, VA 22102
(703) 610-6126

*Counsel of Record

CATHERINE E. STETSON*
CHRISTOPHER T. HANDMAN
DOMINIC F. PERELLA
HOGAN & HARTSON LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

Counsel for Respondent
The Fairchild Corporation

REPLY BRIEF

15

No. 07-371 4-7-08

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL JOHN PANGIA
THE LAW OFFICES OF MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

April 2008

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

A. Taylor Is Not in Privity with Herrick. 1

B. The Court of Appeals' Result Was Wrong 8

1. Taylor and Herrick are not "functionally acting as one." 8

2. Taylor's interests are not "derivative" of Herrick's, nor is he Herrick's "proxy." 12

3. Respondents have the burden of proof. 15

C. There Is No FOIA Exception to Due Process or Preclusion Principles. 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Adams v. Kinder-Morgan, Inc.,
340 F.3d 1083 (10th Cir. 2003) 15

America Forest Council v. Shea,
172 F. Supp. 2d 24 (D.D.C. 2001) 5

Browning v. Levy,
283 F.3d 761 (6th Cir. 2002) 15

Cafeteria & Restaurant Workers Union v. McElroy,
367 U.S. 886 (1961) 19

Collins v. E.I. Dupont de Nemours & Co.,
34 F.3d 172 (3d Cir. 1994) 10

Corprew v. Tallapoosa County,
241 Ala. 492 (1941) 17

FEC v. Akins,
524 U.S. 11 (1998) 17

Goldberg v. Kelly,
397 U.S. 254 (1970) 19

Gonzalez v. Banco Central Corp.,
27 F.3d 751 (1st Cir. 1994) 15

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 17

Latham v. Wells Fargo Bank, N.A.,
896 F.2d 979 (5th Cir. 1990) 5

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 19, 21

Martin v. America Bancorp. Retirement Plan,
407 F.3d 643 (4th Cir. 2005) 5

Martin v. Wilks,
490 U.S. 755 (1989) 5

Mathews v. Eldridge,
424 U.S. 319 (1976) 19

Montana v. United States,
440 U.S. 147 (1979) 1, 4, 5, 7

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 19, 20

Postal Telegraph Cable Co. v. Newport,
247 U.S. 464 (1918) 6, 7

Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) 14, 17, 18

Richards v. Jefferson County,
517 U.S. 793 (1996) ..... *passim*

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999) 10, 20

Tyus v. Schoemehl,
93 F.3d 449 (8th Cir. 1996) 3, 5

United States v. Vasilakos,
508 F.3d 401 (6th Cir. 2007) 5

Wilkinson v. Austin,
545 U.S. 209 (2005) 19

Statutes and Rules:

5 U.S.C. § 552(a)(3)(A)(iii) 17, 21

5 U.S.C. § 552(a)(4)(B) 17, 18, 21

31 U.S.C. § 3730(b)(5) 21

33 U.S.C. § 1319(g)(6)(A)(ii) 21

Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) 13, 14

Fed. R. Civ. P. 8(c) 15

Fed. R. Civ. P. 11(c) 20

Other Authorities:

65 Am. Jur. 2d *Quo Warranto* § 79 17

Black's Law Dictionary (7th ed. 1999) 14

Restatement of Judgments (1942) 14

Restatement (Second) of Judgments (1982) ..... *passim*

C. Wright, A. Miller, & E. Cooper, Federal
Practice & Procedure (2d ed. 2002) 5, 6, 15

REPLY BRIEF FOR PETITIONER

Respondents repeatedly say that Greg Herrick cannot "relitigate" his lawsuit. That point is uncontroverted. But the question is not whether Herrick will be given his second day in court; it is whether Brent Taylor will be given his *first*. Respondents' claims for preclusion require them to mischaracterize Taylor's arguments, ignore the constitutional and common-law limits on privity, and misconstrue the personal right of action provided by the Freedom of Information Act (FOIA). Both due process and accepted preclusion principles forbid binding Taylor to the judgment in Herrick's case.

A. Taylor Is Not in Privity with Herrick.

1. Respondents' chief argument relies on knocking down a straw man. According to respondents, Taylor's opening brief argued that a non-party is bound to the judgment in a case only when there is a legal relationship between the party and non-party, *see, e.g.*, Fairchild Br. 2, 29; Gov't Br. 13, 26, and that argument cannot be reconciled with cases, such as *Montana v. United States*, 440 U.S. 147 (1979), in which preclusion was applied despite the absence of a legal relationship. Respondents' premise is incorrect. Taylor did not argue that a legal relationship is always necessary for preclusion, but that a legal relationship is necessary for *preclusion based on the theory that the non-party was represented by a party to the prior case*. *See, e.g.*, Pet. Br. 8, 15, 19. Taylor openly acknowledged in his opening brief (at 10 n.2, 26) that preclusion can be based on factors besides representation, such as the non-party's control of the first litigation (the circumstance in *Montana*), or the existence of a special statutory remedial scheme that limits successive litigation over a particular subject matter.

But the court below did not hold that a special remedial scheme existed or that Taylor controlled Herrick's case. Nor did it hold that Taylor had induced defendants to believe he would not assert his claim, *see* Fairchild Br. 31, or that Taylor's claim resulted from personal injury to another person, *see* Gov't Br. 23-24, or that Taylor was litigating this case as Herrick's agent on Herrick's behalf. And the court of appeals could not have so held: None of those theories of preclusion even arguably applies here.

Rather, the court of appeals held that Taylor was precluded from litigating his claim because he had been adequately or virtually represented by Herrick in the earlier litigation. *See, e.g.*, Pet. App. 17a. Similarly, the district court held that Taylor had been virtually represented by Herrick. *See id.* at 22a. Respondents themselves argued below that Taylor had been virtually represented by Herrick. *See, e.g.*, Fairchild Br. Ct. App. 19; Gov't Br. Ct. App. 12. And the question presented to this Court for review was whether a non-party can be precluded "*under a theory of 'virtual representation'*" when he had no legal relationship to any party to the case and no notice of the case. Pet. i (emphasis added).

2. As Taylor explained in his opening brief (at 9-17), a non-party can only be bound by the judgment in a case under the theory that he was represented by a party to the case if that party had the authority to represent him—that is, if they had a legal relationship under which the party was accountable to the non-party for the conduct of the litigation. *See Richards v. Jefferson County*, 517 U.S. 793, 802 (1996).[1] Taylor and Herrick do not

---

[1]Contrary to the government's claims, the relationships between guardians and wards and trustees and beneficiaries are not "the

(*Footnote continued*)

have such a relationship. Accordingly, although both the district court and court of appeals held that Herrick had "adequately" or "virtually" represented Taylor, respondents do not base their arguments on such representation. *See* Fairchild Br. 40 (claiming that the court of appeals "did not confront . . . an 'adequate representation' case"). Rather, they argue that Taylor and Herrick are in "privity."

Respondents do not assert any recognized form of privity. Instead, they claim Taylor and Herrick are in privity because privity is a flexible, fact-bound, equitable inquiry. But although "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term," *Richards*, 517 U.S. at 798, and although courts examine the facts to determine whether privity exists (as they do whenever they apply the law to the facts), courts do not just set forth the facts and then perform a gut-check to determine whether the non-party should be bound. They apply legal standards. *See, e.g.*, *Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996) (setting forth categories of privity).

Respondents implicitly recognize that there are legal standards for binding non-parties by repeatedly citing with approval the Restatement (Second) of Judgments, ch. 4, as this Court did in describing privity in *Richards*, 517 U.S. at 798. *See* Gov't Br. 13, 21, 23, 24, 27; Fairchild

---

only ones that petitioner's rule encompasses." Gov't Br. 21. For example, a representational relationship could also be created by an employment or agency relationship, an agreement that the party would represent the non-party, or the proper certification of a class. *See* Pet. Br. 14, 16; Restatement (Second) of Judgments § 41 (1982) (listing numerous circumstances under which a person is "represented by a party").

Br. 20, 22, 30, 31, 34; *id.* at 36 (noting that *Richards* cited the Restatement "with approval"). The Restatement does not state that preclusion applies whenever a court deems it "fair" or "equitable." Instead, as Fairchild observes (at 20, 34), chapter four of the Restatement contains 30 sections detailing the circumstances under which parties and non-parties can and cannot be bound. Notably, neither respondent demonstrates—or even tries to demonstrate—that the circumstances in any of those 30 sections are present here.

3. The circumstances described in the Restatement under which non-party preclusion may be appropriate fall into three categories: "First, a person who is represented by a party is bound by the judgment in an action involving the representative party." Restatement (Second) of Judgments § 62, cmt. a.

"Second, a person standing in one of a variety of preexisting legal relationships with a party may be bound by a judgment affecting that party." *Id.* The relationships in this second category are substantive legal relationships, such as the relationships between assignors and assignees, *id.* § 55, bailors and bailees, *id.* § 52, and between people having a relationship in which one is vicariously liable for the conduct of the other. *Id.* § 51; *see generally id.* §§ 43-61.[2] This second category is what is traditionally referred to as "privity." *Id.* § 62, cmt. a.[3]

---

[2]This category also includes the relationship between a principal and an agent who is litigating the second case on the principal's behalf, where the principal was a party to the first action.

[3]Lower courts often call the first and third categories "privity" as well, *see, e.g.*, Pet. App. 6a, but this Court has tended not to include them within that rubric. *See Richards*, 517 U.S. at 798; *Montana*, 440 U.S. at 154 n.5. Whether all three categories are referred to as types of "privity" or whether the term is limited to the second

(*Footnote continued*)

Finally, "a person who is not a party to an action may be precluded by the judgment in an action when he is involved with it in a way that falls short of becoming a party but which justly should result in his being denied opportunity to relitigate the matters previously in issue." *Id.* This category includes a non-party controlling litigation, *id.* § 39, agreeing to be bound by litigation, *id.* § 40, or inducing the parties to a case to rely on the expectation that he will be bound by its judgment. *Id.* § 62.

These three categories are not limited to the Restatement. Courts often use similar categories to describe the "categories of non-parties who will be . . . bound by a prior adjudication." *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005); *see also, e.g., United States v. Vasilakos*, 508 F.3d 401, 406 (6th Cir. 2007) (explaining that non-party preclusion is limited to three circumstances: when a non-party controls the action, when a non-party is a successor-in-interest to a party, and when a non-party's interests were adequately represented by a party); *Tyus*, 93 F.3d at 455 (recognizing same three categories); *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990) (same); *Am. Forest Council v. Shea*, 172 F. Supp. 2d 24, 31 (D.D.C. 2001) (same) (quoting *Tyus*); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure

---

category while the first and third categories are considered nonprivity forms of preclusion is irrelevant. In addition, as Taylor pointed out in his opening brief (at 10 n.2), this Court has noted the existence of certain "special remedial scheme[s]" that may "foreclose[] successive litigation by nonlitigants," as long as they are "otherwise consistent with due process." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). Those remedial schemes are not types of "privity" and are not at issue in this case. *See Richards*, 517 U.S. at 798; *Montana*, 440 U.S. at 154 n.5.

§ 4448, pp. 328-29 (2d ed. 2002) (explaining that "the most obvious justification [for non-party preclusion] is found in cases that extend preclusion to a person who was not a formal party to the first litigation but who participated so extensively as to assume a de facto role as an actual party," but that non-party preclusion is also "found in a variety of rules that extend preclusion to persons who somehow were represented in the first litigation," and that "[i]n some circumstances, persons holding successive interests in the same property or claim can preclude each other").

Indeed, in their briefs to the court of appeals, both respondents set forth categories of privity nearly identical to these. As Fairchild explained: "There are three generally recognized categories of non-parties who will be considered in privity with a party to a prior action and who will therefore be bound by a prior adjudication: (1) a non-party who controls the original action; (2) a successor-in-interest to a prior party; and (3) a non-party whose interests were adequately represented by a party to the original action." Fairchild Br. Ct. App. 12; *see also* Gov't Br. Ct. App. 12 (listing same three categories of privity).

4. The three broad categories of non-party preclusion are not just a random compilation of the results of fact-patterns that happen to have come before courts. They encompass the situations in which a non-party can be found to be in privity with a party consistent with due process.[4] Because "'[t]he opportunity to be heard is an

[4]As to Fairchild's suggestion that Taylor might have abandoned his constitutional argument, Fairchild Br. 35-36, Taylor cited the Fifth Amendment's Due Process Clause under the heading "Constitutional Provision Involved" on the first page of his opening brief, discussed the due process guarantees of notice and the opportunity

(*Footnote continued*)

essential requisite of due process of law in judicial proceedings,'" *Richards*, 517 U.S. at 797 n.4 (quoting *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918)), privity must be limited to circumstances in which the non-party's relationship to the prior party or litigation ensures that the non-party received the opportunity to be heard.

Thus, the first category (representation) involves circumstances in which the non-party *did* have the opportunity to be heard, albeit through a representative authorized to speak on his behalf, rather than directly. The second category (successors-in-interest and other legal relationships) involves circumstances in which the legal relationship between the party and non-party justifies treating them as the same legal person for the purposes of the litigation, so that the party's opportunity to be heard counts as the non-party's opportunity to be heard. And the third category involves circumstances in which the non-party's engagement in the case provided him with the "full and fair opportunity to litigate," *Montana*, 440 U.S. at 153, even though he was not a party, or where the non-party effectively waived his right to be heard by, for example, agreeing to be bound by the judgment in the case or behaving in such a way as to be estopped from denying that he should be bound. *See* Restatement (Second) of Judgments §§ 40, 62.

Within these categories, there may be room for dispute over whether a particular relationship justifies pre-

---

to be heard in his summary of the argument (Pet Br. 8-9), and further discussed due process on pages 9, 10, 12, 13, 14, 17, 18, 19, 20, 21, 30, 32, 33, and 34 of his opening brief. In contrast to Fairchild, the government acknowledges (at 44) that Taylor is making a due process argument.

clusion. This Court need not, to resolve this case, adopt the Restatement's view of which particular legal relationships, for example, should lead to preclusion. But a relationship that does not fall within any of these broad categories cannot lead to preclusion (or qualify for the "privity" label) under either the Constitution or common-law preclusion principles.

5. This case does not fall within any of the three categories: Taylor and Herrick have no substantive legal relationship, so it is not within the second category, and it is undisputed that Taylor was not involved in Herrick's litigation, so it is not within the third category. Thus, the only even plausible argument is that this case falls within the first category—that Taylor was represented by Herrick. As Taylor demonstrated in his opening brief (at 9-17), however, the first category requires a legal relationship under which the party is accountable to the nonparty for the conduct of the litigation. Because Herrick and Taylor did not have such a relationship, and because none of the other categories of privity even arguably applies, Taylor cannot be bound by the results of Herrick's case.

B. The Court of Appeals' Result Was Wrong.

Respondents repeatedly use conclusory terms—that Taylor and Herrick have a "close working relationship relative to these successive cases," that Taylor is Herrick's "proxy," that Taylor's interests are "derivative," and that they are engaged in "coordinated litigation"—to argue that it is appropriate to hold Taylor bound. Both the law and the facts belie respondents' claims.

1. Taylor and Herrick are not "functionally acting as one."

Despite respondents' repeated use of the phrase "a close working relationship relative to these successive

cases" and Fairchild's contention that Herrick and Taylor are "functionally the same" and were "functionally acting as one," the record facts simply do not support the conclusion that Taylor is Herrick's privy.

Here is the sum-total of the facts in the record on summary judgment relating to Herrick and Taylor's relationship:

1) Herrick and Taylor are both members of the Antique Aircraft Association (Pet. App. 2a; J.A. 15);

2) Herrick and Taylor both made FOIA requests for records about the F-45 (J.A. 20-21, 65);

3) After Herrick's case concluded, Taylor hired the lawyer Herrick had used (*id.* at 19, 22-23);

4) Herrick gave Taylor some unprivileged material Herrick had obtained through discovery (*id.* at 27, 28);

5) At some point before Taylor's motion for discovery (filed 16 months after his FOIA request), Herrick asked Taylor for help fixing his airplane (*id.* at 32);

6) Taylor heard about the *Herrick* decision[5] and discussed it in his administrative appeals, complaint, and motion for discovery, (J.A. at 17, 23, 27-32, 43); and

7) Taylor did not dispute the characterization of Herrick as his "close associate" (*id.* at 54).

Respondents concede that the first two facts are insufficient to bind Taylor to Herrick's litigation. *See* Fair-

---

[5] *See* Opp. Mot. to Def. Mot. to Dismiss and for Summ. J., Dist. Ct. Doc. No. 34, at 6.

child Br. 45-46 (stating that the D.C. Circuit's holding "would not justify preclusion in any of the scenarios presented by the *amici*," which include preclusion based on being interested in the same documents and being members of the same organization); Gov't Br. 18-19 (agreeing that multiple, independent requesters could each seek judicial review). *Richards* makes clear that sharing the same interests as a prior litigant does not lead to preclusion.

Nor does Taylor's hiring of the lawyer Herrick used (the third fact) place the men in privity. In *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 168 (1999), this Court explained that preclusion could not be based on use of the same lawyer, even in combination with an identity of interests. Basing privity on hiring the same lawyer would "inhibit the free choice of attorneys and prevent attorneys from developing an expertise through concentration in certain types of litigation." *Collins v. E.I. Dupont de Nemours & Co.*, 34 F.3d 172, 179 (3d Cir. 1994). Indeed, if there were a preclusion-based rule effectively requiring Taylor to have retained a different lawyer, that lawyer would have been well-advised to consult with Herrick's lawyer to learn what he could about the relevant issues.

Taylor also cannot be bound on the basis that Herrick gave him discovery materials and asked him for help with his plane (facts four and five). Both of those facts involve one-sided actions by Herrick, and a person cannot be denied the right to litigate his own claim because of someone else's unilateral actions.

With regard to the sixth fact, discussing a prior case in letters, pleadings, and motions does not place a plaintiff in privity with any party to that case. Taylor brought up *Herrick v. Garvey* to point out that another court had

already found that the requested records had lost their trade secret status in 1955, but that the previous court's conclusion that the records had regained their trade secret status had been based on Herrick's waiver of potentially dispositive arguments. *See* J.A. 23. Taylor's candor in alerting the court to the *Herrick* decision, and his desire for the court to follow the parts of that decision that were favorable to him, do not establish any relationship between him and Herrick or between him and Herrick's litigation.[6]

That leaves the seventh fact: that Taylor did not dispute the characterization of Herrick as his "close associate." But that term, alone, is meaningless; people have many "close associates" in their lives with whom they are not in privity. And if the term "a close associate of Taylor's" is intended to be equivalent to "a privy of Taylor's," then it is not a fact at all, but rather a legal conclusion that is not justified by the facts in the record.

In short, Fairchild's claim (at 41) that the D.C. Circuit's test is narrow and applies res judicata only where the parties "function as one" is proven wrong by the

---

[6]Similarly, the timing of Taylor's FOIA request, which Respondents emphasize, *see* Gov't Br. 15, 39, 40; Fairchild Br. 40, 45, does not show any relationship between him and Herrick. Taylor explained in his motion for discovery that the *Herrick* decision helped motivate him to file his FOIA request, but the motivation he mentioned was not "his relationship with Herrick." Gov't Br. 6. Rather, it was that hearing that the *Herrick* court had found that the F-45 records had lost their trade secret status in 1955 convinced him that he was legally entitled to the records. *See* J.A. 32 ("In view of the fact that it had already been adjudicated that this material ceased being a secret in 1955 . . . [Taylor] requested that the FAA loan the material to him under the FOIA."). Taylor's legal analysis of the *Herrick* decision does not place him in privity with any party to that decision.

facts of this very case. Respondents claim "flexibility" is a defining characteristic of privity, *see, e.g.*, *id.* at 29; Gov't Br. 19, but flexibility does not mean anything goes, and despite respondents' repeated assertions to the contrary, the record evidence does not support the conclusion that Herrick's litigation fulfilled Taylor's due process rights to notice and the opportunity to be heard.

2. Taylor's interests are not "derivative" of Herrick's, nor is he Herrick's "proxy."

In contending that Taylor is Herrick's privy, respondents rely heavily on the notion that Taylor's interests in the records are "derivative" of Herrick's. *See, e.g.*, Gov't Br. 21; Fairchild Br. 45. That claim is wrong both factually and legally.

First, the evidence does not support respondents' repeated assertions that Taylor requested the records because he was helping Herrick restore his airplane. *See, e.g.*, Gov't Br. 15 (claiming Herrick and Taylor were engaged in a "common project to restore Herrick's plane"); *id.* at 21 (claiming Taylor and Herrick had an "intent to restore the very same airplane"); *id.* at 40 (asserting that Herrick's interest in restoring his plane had "given rise ... to petitioner's request"); Fairchild Br. 25 ("[B]oth Taylor and Herrick wanted the documents to restore Herrick's plane."). Although there is evidence in the record that Herrick *wanted* Taylor's help with his plane, there is no evidence that Taylor requested the records for that reason or even that he was in fact helping Herrick, as the court of appeals acknowledged. *See* Pet. App. 10a (explaining that "the district court erred in stating at summary judgment that Taylor had agreed to help restore the aircraft").

Even if Taylor did want to help Herrick restore his plane, however, that fact would not be relevant in deter-

mining whether Taylor had a right to litigate his claim. The purpose for which Taylor intends to use records to which he has a statutory right is irrelevant.

The following hypothetical illustrates the point. Suppose A and B have separate contracts with C, and C breaches both of the contracts. A and B both decide to sue C for breach of contract, and each, in his respective lawsuit, claims damages of $10,000. A needs an operation he cannot afford and, if he wins his case, is going to put the $10,000 towards the operation. B knows A and feels bad that A cannot afford the operation. Therefore, if B wins his separate case, he is also going to put the money he receives towards paying for A's operation. Does B's decision to give the money he receives to A place him in privity with A? Of course not. The underlying purpose for which someone uses the remedy to which he is legally entitled does not affect whether that person is in privity with the party to another case.

To be sure, people sometimes have *claims* (rather than motivations) that are derivative of other people's, and the fact that the claim is derivative can be relevant to the preclusion inquiry. *See, e.g.*, Restatement (Second) of Judgments § 48 (discussing preclusion in actions for losses resulting from personal injury to another). But Taylor's claim is not derivative of Herrick's. Taylor did not sue over the FAA's denial of Herrick's FOIA request; he sued over the FAA's denial of his own FOIA request. And Congress has made clear that a FOIA requester's right to records does not depend on his reasons for asking for the records. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (explaining that FOIA establishes and enables "enforcement of the right of any person to obtain access to [agency] records . . . for

any public or private purpose"). Given that Taylor had his own non-derivative right to the requested records, the purpose for which he was going to use those records does not undermine his right to his own day in court.[7]

Respondents' insinuations that Taylor is Herrick's "proxy" fail for similar reasons. As Taylor noted in his opening brief (at 23 n.4) and above (at 4 n.2), non-parties can be precluded if they are bringing a second lawsuit as undisclosed agents for parties to a prior case. The facts in the record, however, do not demonstrate that Taylor is Herrick's agent. Accordingly, and although the relationship between a principal and proxy is an agency relationship, *see* Black's Law Dictionary 1241 (7th ed. 1999) (defining proxy as one "who is authorized to act as a substitute for another"); *cf.* Restatement of Judgments § 85(2), cmt. b (1942) (explaining that "on [a prior litigant's] account" means that the prior litigant "is represented by another"), respondents seem to use the word "proxy" to mean something less than an agent; they imply that Herrick "enlisted" Taylor to bring this case in some unspecified way that did not create an agency relationship but still somehow suffices to bind Taylor. Gov't Br. 19; *see id.* at 43-44. However, even if Taylor had

---

[7]FOIA's standing requirements highlight this point. The government is incorrect in its assertion (at 14) that FOIA litigants are allowed to "avoid a traditional showing of standing." Like all other federal court litigants, FOIA complainants must establish that they suffered an injury in fact: They must show that they "sought and were denied specific agency records." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989). It is precisely *because* a FOIA complainant's claims are not derivative of other requesters' claims that this showing of standing will not "confirm the extent of [a complainant's] relationship to an earlier litigant." Gov't Br. 15. The injuries that establish a FOIA complainant's standing are his own, not injuries suffered by other complainants.

wanted to help Herrick, that motivation would be irrelevant, as long as he was not acting as Herrick's agent: When a person has an individual legal claim, his personal motivation for pursuing that claim cannot deny him his due process right to the opportunity to be heard.

Moreover, even if there were an amorphous non-agent "proxy" category of preclusion, respondents' claim would still fail on the facts, which do not demonstrate that Herrick enlisted or otherwise put Taylor up to filing this case. As the D.C. Circuit noted, Taylor could have "acted on his own to file an identical FOIA request." Pet. App. 17a. This Court should not affirm a holding that Herrick represented Taylor in *Herrick v. Garvey*—and distort preclusion doctrine principles designed to address situations where litigants were represented in *prior cases*—based on unproven insinuations that Taylor is representing Herrick here.

3. Respondents have the burden of proof.

Finally, Fairchild falls back on the fact that Taylor did not submit evidence rebutting Fairchild's mere *accusations* that he was Herrick's proxy. *See, e.g.*, Fairchild Br. 28. But the burden of proof was on respondents. *See, e.g., Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093, 1094 (10th Cir. 2003); *Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); 18 Wright, Miller, & Cooper § 4405, p. 83 ("Once properly raised, a party asserting preclusion must carry the burden of establishing all necessary elements."); Fed. R. Civ. P. 8(c) (designating res judicata an affirmative defense). Taylor cannot be denied his day in court for not meeting a burden he did not have.

C. There Is No FOIA Exception to Due Process or Preclusion Principles.

Unable to demonstrate that Taylor and Herrick had a relationship sufficient to establish that they were in privity, respondents suggest that such a relationship is not necessary in FOIA cases. Respondents' argument is foreclosed by *Richards*.

In *Richards*, this Court distinguished between two types of taxpayer cases, and whether they are labeled two types of "public-law" cases or whether they are labeled "public-law" and "private-law" cases is irrelevant. The critical point is that this case, like *Richards*, does not fall into the type of case where expanded notions of preclusion are permissible. On the one hand are cases in which "the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds . . . or about other public action that has only an indirect impact on his interests." 517 U.S. at 803. In those cases, the taxpayer has not suffered a personal injury, and states can deny him standing altogether, or, if they choose, grant standing but apply more stringent standards of preclusion than would be permissible in cases where a litigant's personal rights are at issue. On the other hand are cases in which the plaintiff *has* suffered a personal injury. As to the former category of cases, "States have wide latitude to establish procedures . . . to limit the number of judicial proceedings that may be entertained." *Id.* But as to the second category—a category that includes both *Richards* and this case—"the State may not deprive individual litigants of their own day in court." *Id.*

According to the government, FOIA cases are in the first category because "the duty to disclose under FOIA is owed to the public generally," Gov't Br. 34, and, there-

fore, FOIA litigants have only an "indirect interest" in their claims. *Id.* at 16. As Taylor explained in his opening brief (at 31-32), however, Congress sought to ensure the public's access to records by providing every FOIA requester with a *personal right* to the requested records. *See* 5 U.S.C. § 552(a)(3)(A)(iii) (providing that records shall be made available to a "person"); *id.* § 552(a)(4)(B) (explaining that when an agency improperly withholds records, it is withholding them "from the complainant").[8] As this Court has held, when someone is denied records to which he is statutorily entitled, he has suffered a "concrete" and "particular" injury in fact. *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Public Citizen*, 491 U.S. at 449 (failure to receive records under FOIA is a "distinct injury"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (injury to statutorily created right to information is "specific injury").

Moreover, the government's claim that a FOIA case is "akin to a taxpayer's right to bring an action *quo warranto* on behalf of the public at large," Gov't Br. 46, is patently wrong. "A quo warranto proceeding is a public proceeding in the name of the State, a necessary party." *Corprew v. Tallapoosa County*, 241 Ala. 492, 494 (1941) (cited in *Richards*, 517 U.S. at 804); *see also* 65 Am. Jur. 2d *Quo Warranto* § 79. Taylor, however, did not file this claim as a relator on behalf of the state; quite the contrary, the government is the defendant here, not the plaintiff, and the injury about which Taylor is complaining is not the public's, but his own. *See* 5 U.S.C.

---

[8] That FOIA's right to records is individual is highlighted by the fact that, as amici National Security Archive *et al.* point out (at 10), FOIA requesters who receive records from the government are under no obligation to disseminate them or otherwise share them with other requesters.

§ 552(a)(4)(B) (enabling court to "order the production of any agency records improperly withheld *from the complainant*") (emphasis added). And even the government concedes that, unlike in quo warranto cases, in which one action is binding on the whole public, there can be multiple FOIA lawsuits over the same records. Gov't Br. 38.

In short, unlike in the quo warranto and taxpayer standing cases cited in *Richards*, there is nothing "indirect" about the impact of a FOIA denial on a requester. Taylor did not sue over a diffuse injury suffered by the public at large, but over a concrete and particular injury he himself suffered when he was denied information to which he was legally entitled. That other people are also legally entitled to those records and "might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [his] asserted injury." *Public Citizen*, 491 U.S. at 449-50.

FOIA's standing requirements, which the government claims weigh in favor of treating FOIA cases as though no individual rights were at stake, demonstrate that FOIA requesters suffer direct injuries when their requests are denied. Contrary to the government's assertions that in a "traditional private suit[]" Taylor would need to show a relationship with Herrick to demonstrate he had standing, Gov't Br. 45, and that relationship would "stymie" the suit, *id.*, a private litigant with a direct legal interest in receiving documents from a defendant would *not* need to demonstrate his relationship with anyone else to show standing. For example, if Taylor and Fairchild entered into a contract under which Fairchild agreed to give Taylor all records in its possession about the F-45, and Fairchild breached that contract, Taylor would not need to demonstrate his relationship with Herrick or anyone else to sue Fairchild. He

would have standing because he would be the injured party. And he would remain an injured party, with standing to sue, and with the due process right to his own day in court, even if Fairchild entered into similar agreements with thousands or millions of other people. Similarly, here, the reason Taylor does not need to show that he has a relationship with Herrick (or anyone else) to have standing is because he is suing over his own injury. As in the hypothetical, he has suffered the direct injury of being denied records to which he is legally entitled. The only difference is that his entitlement comes from statute rather than from contract.

Respondents posit that FOIA requesters are due less process because their legal entitlement is to documents rather than to money damages, civil rights, or the right to alienate property. Fairchild Br. 42-43; Gov't Br. 45-46. They provide no rationale, however, for why a statutory right to records is deserving of less protection than any other statutory right. And Taylor was not just denied documents, but his "cause of action," which, in and of itself, "is a species of property protected by the . . . Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

In any event, the cases respondents cite about due process requirements depending on the nature of the interest are all off point. Those cases discussed what *procedures* fulfill due process requirements. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). But there is no flexibility in whether a litigant must receive a full and fair opportunity to litigate his claim. *See Mullane*, 339 U.S.

at 313-14. The question here is not about the sufficiency of the *type* of notice and opportunity to be heard Taylor received. Taylor received no notice or opportunity to be heard at all.

To be sure, FOIA gives anyone who has exhausted his administrative remedies the right to judicial review, which can lead to multiple cases over similar records. The possibility of multiple cases, however, does not justify denying each of the injured parties his opportunity to be heard on his own claim. In *Richards*, numerous people had standing to sue over the constitutionality of the county tax at issue, but, nonetheless, the Court rejected the defendants' argument that "the character of their action renders the usual constitutional protections inapplicable." *Richards*, 517 U.S. at 802-03.

Further, despite the government's sky-is-falling predictions (at 43) that applying normal constitutional protections to FOIA cases would lead to "no end to FOIA litigation," respondents have not demonstrated a pattern of successive requesters filing suit over the same records. And even if there were such a pattern, the law already has methods of handling successive lawsuits over the same issue: stare decisis, or, in some cases, sanctions for litigation that has no reasonable basis in law or fact. *See* Fed. R. Civ. P. 11(c). Litigation is expensive, and FOIA requesters are not going to file suit if they know they will lose. But the fact that the rule of law announced in a case may apply to a later litigant does not justify finding that litigant "in privity" with a party to the case, or binding him to its judgment without such a finding. *See Richards*, 517 U.S. at 805; *see also S. Cent. Bell Tel. Co.*, 526 U.S. at 168.

In the end, respondents' argument comes down to a complaint that they should not have to defend multiple

requesters' suits for similar records. They insist, however, that their approach would "affect only the rare successive plaintiff," Fairchild Br. 46, demonstrating that preclusion is not the solution to repeated litigation over the same records. Moreover, in contending their approach would preclude few cases, respondents accept that FOIA allows for multiple requests and lawsuits over the same records. *See id.*; Gov't Br. 38. As the government points out (at 47), Congress could have chosen not to provide all requesters with a statutory entitlement to records and established a statutory scheme under which only one lawsuit could be brought over any given set of records. *See* 31 U.S.C. § 3730(b)(5) (permitting only one qui tam action on a set of facts); *cf.* 33 U.S.C. § 1319(g)(6)(A)(ii) (citizen suits under Federal Water Pollution Control Act Amendments of 1972 barred by prior actions by state). But Congress did not set up such a scheme. Instead, it gave "any person" the right to non-exempt requested records, 5 U.S.C. § 552(a)(3)(A)(iii), and it gave any requester the right to seek judicial review. *Id.* § 552(a)(4)(B). Although "the legislature may elect not to confer a property interest," once that interest is created, its deprivation "must be analyzed in constitutional terms." *Logan*, 455 U.S. at 432 (internal citations omitted). Respondents' gripe with Congress's chosen statutory scheme does not justify denying FOIA requesters their right to their own day in court.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings on the merits of petitioner's FOIA claim.

Respectfully submitted,

MICHAEL JOHN PANGIA
THE LAW OFFICES OF
MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

April 2008

AMICUS CURIAE BRIEF

84
59801
18pgs

No. 07-371

FILED
FEB 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

KATHLEEN FLYNN PETERSON
1050 31st Street, N.W.
Washington, DC 20007
(202) 965-3500
President, American Association for Justice

John Vail*
Andre M. Mura
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2803
Counsel for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. A Privity Exception Premised on Close Association, Adequate Representation, and Identical Interests Is Inconsistent with Common-Law Preclusion Principles and Exceeds Constitutional Bounds 3

A. Privity exists only when the non-party assents to representation or is owed a legal duty of representation 3

B. Preclusion based on the D.C. Circuit's virtual-representation rule is inconsistent with this Court's own application of the privity exception 5

C. Preclusion based on the D.C. Circuit's virtual-representation rule is inconsistent with the Constitution 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 6

Bedingfield v. Jefferson County, 527 So.2d 1270 (Ala. 1988) 8

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 11

Chase National Bank v. City of Norwalk, 291 U.S. 431 (1934) 12

Christopher v. Harbury, 536 U.S. 403 (2002) 3

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) 13

Federal Election Commission v. Akins, 524 U.S. 11 (1998) 7

Hansberry v. Lee, 311 U.S. 32 (1940) 3, 8

Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) ..... *passim*

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 11

Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989) 13

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 4

Martin v. American Bancorp. Retirement Plan, 407 F.3d 643 (4th Cir. 2005) 6

Martin v. Wilks, 490 U.S. 755 (1989) 5

Montana v. United States, 440 U.S. 147 (1979) 5

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 11

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 5

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) 10

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 3, 7

Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918) 4, 10

Richards v. Jefferson County, 517 U.S. 793 (1996) ..... *passim*

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999) 6, 8, 9

Southern Pacific Railroad Co. v. United States, 168 U. S. 1 (1897) 4

Board of Regents v. Roth, 408 U.S. 564 (1972) 13

Tice v. American Airlines, Inc., 162 F.3d 966 (7th Cir. 1998). 6

Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) 6

Vitek v. Jones, 445 U.S. 480 (1980) 13

CONSTITUTIONAL PROVISIONS

United States Constitution, amendment I 3

United States Constitution, amendment V 3

STATUTES

5 U.S.C. § 552(a)(4)(B) 7

OTHER AUTHORITIES

Simon Greenleaf, *A Treatise on the Law of Evidence* (13th ed. 1899) 4

James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. Rev. 383 (1983) 4

Restatement (Second) of Judgments (1982) 4, 5

INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Petitioner. This brief is filed with consent of all parties.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in personal injury cases and other civil actions. Throughout its 60-year history, the association has advocated both in courts and in Congress and state legislatures to preserve the protections for ordinary citizens afforded by the fundamental principle in American law that every person is entitled to his or her day in court.

---

[1] Letters of consent from both parties are on file with the Author. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or its counsel make a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The Constitution guarantees every American an opportunity to present their case and to have its merits adjudged fairly. The rule is part of our nation's deep-rooted historic tradition that everyone should have his or her own day in court. Well-recognized common-law rules allow a non-party who is in privity with a party to a suit to be bound by the judgment in that case on the theory that the non-party has had an opportunity to be heard through the privy. But there are similarly well-recognized constitutional limits on the privity exception.

The D.C. Circuit exceeded those limits when it barred Petitioner Brent Taylor from receiving an adjudication of the merits of his suit to compel disclosure of information under the Freedom of Information Act because Greg Herrick had already litigated the issue and lost. Taylor shared no legal or special representational relationship with Herrick, had no notice of Herrick's suit, had no legal duty to participate in Herrick's suit and did not participate. Nevertheless, the Circuit Court held that preclusion by "virtual representation" is justified because Herrick and Taylor had identical interests in obtaining the information; those interests were adequately represented in Herrick's litigation; and Herrick and Taylor were "close associates."

The lower court's holding, based on an intolerably expansive view of privity, is fundamentally unfair to Taylor and violates his right to an adjudication of his individual claim. The privity exception comports with common-law preclusion principles and falls within constitutional

bounds only when it is premised on the assent of the non-party or where the party owes a legal duty of representation to the non-party. A privity exception premised on close association, adequate representation, and identical interests is inconsistent with those principles and exceeds constitutional bounds.

ARGUMENT

I. A Privity Exception Premised on Close Association, Adequate Representation, and Identical Interests Is Inconsistent with Common-Law Preclusion Principles and Exceeds Constitutional Bounds

A. Privity exists only when the non-party assents to representation or is owed a legal duty of representation

Our nation has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (internal citations omitted). From this tradition comes a general principle that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). The First Amendment Petition Clause and the Fifth Amendment Due Process Clause support this principle. U.S. Const. amends. I, V; *see Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (recognizing a "a separate and distinct right to seek judicial relief for some wrong"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (recognizing that due

process guarantees an individual who has a "constitutionally recognized property interest" in a "chose in action," an opportunity to present his case and have its merits adjudged fairly); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (same).

This Court has long recognized common-law doctrine that permits a non-party who is in "privity" with a party to a suit to be bound by the judgment in the party's case on the theory that the non-party has had an opportunity to be heard through his privy. *See, e.g., Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918); *Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, 48 (1897). A non-party is in "privity" with a party to a suit and may be bound by the judgment when there exists, throughout the course of the litigation, a legal or special representational relationship under which the party is accountable to the non-party for the conduct of the litigation. Restatement (Second) of Judgments § 40-41 (1982); James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. Rev. 383, 387-89 (1983) (noting as examples of such representational relationships successors in interest or owners of derivative claims); 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 523 (13th ed. 1899) (privity exists where there is "a mutual or successive relationship to the same rights of property"). Under this uncontroversial conception of privity, it is the nature of the party and non-party's relationship to the shared interest that forms the basis of their representational relationship as privies.

Other recognized examples include instances where there is an agreement regarding representation, such as an indemnification agreement; or where a representative is duly appointed, such as in a proceeding involving a guardian or trustee, *Richards*, 517 U.S. at 798; or in a certified class-action proceeding. *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); Restatement (Second) of Judgments § 41 cmt. e. (1982). These examples share a common thread: in each the representational relationship is formed with the non-party's assent or the law imposes on the party a duty to act in the non-party's interest. Similarly, a "person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Restatement (Second) of Judgments § 39 (1982); *see Montana v. United States*, 440 U.S. 147, 155 (1979) (holding that the United States had a sufficient "laboring oar" in a prior litigation to be bound by the judgment and precluded from re-litigating the same issues).

B. Preclusion based on the D.C. Circuit's virtual-representation rule is inconsistent with this Court's own application of the privity exception

Despite this Court having cautioned that when considering exceptions to the general rule of entitlement to individualized adjudication "the burden of justification rests on the exception," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), lower federal courts have not consistently held that the existence of a legal or special representational

relationship is a prerequisite to a finding of privity. *Compare Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005) (requiring such a relationship) *with Tyus v. Schoemehl*, 93 F.3d 449, 454-55 (8th Cir. 1996) (requiring a "special" but not legal relationship). Of relevance here, some have held that under a modern form of privity known as virtual representation, "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *E.g.*, *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975).[2] This notion changes precedent to preclusion, in violation of the constitutional right to an individualized determination of a particular claim. *See South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (acknowledging that strangers to litigation could not expect to be bound by the judgment in that case, but could expect that the "earlier judgment itself . . . would bind them in the same way that a decided case binds every citizen").

Pushing "virtual representation" even farther beyond constitutional bounds, the D.C. Circuit held that identical interests and adequate representation are necessary conditions for virtual representation, but that a legal relationship is not. Pet. App. 8a. It read *Richards* to permit preclusion based on a "close association" rather than a legal relationship. *Id.* at

---

[2] *Askew* is credited with articulating the modern form of preclusion by virtual representation. *Tice v. American Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir. 1998). The cases *Askew* cites for the proposition that identity of interests may support a finding of preclusion are in fact cases where preclusion was based on the shared legal identity of parties. 511 F.2d at 719.

5a-6a. It further held that notice is not a requirement of virtual representation. *Id.* at 13a.

A privity exception premised on a close association runs contrary to common-law preclusion principles, which permit privity only when there is a legal or special representational relationship under which the party is accountable to the non-party for the conduct of the litigation. A close association, which here is based on nothing more than a colloquial association between Herrick and Taylor, who are members of the same organization, Pet. Br. at 2, does not rise to the level of a representational relationship that would support a finding of privity under the common law. In contrast with cases supporting privity where the property interest is mutual or successive, both Herrick and Taylor had a "constitutionally recognized property interest" in their statutory "chose in action" under FOIA. *Shutts*, 472 U.S. at 807. *See* 5 U.S.C. § 552(a)(4)(B) (granting federal district courts jurisdiction to compel disclosure of FOIA-related material); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (recognizing that the inability to obtain information is an injury in fact). And in contrast with cases supporting a finding of privity where the non-party had assented to the party's representation during the course of the litigation, here there was no assent, as Taylor lacked actual or constructive notice of Herrick's suit, and thus could not have participated in or assisted Herrick in prosecuting his separate suit. A separate finding that Herrick and Taylor shared identical interests or that Herrick adequately represented Taylor does not transform the nature of their colloquial relationship into one with a legal character.

This Court's recent decisions in *Richards* and *South Central Bell* support the view that privity is constitutionally sufficient to support preclusion only when it is premised on the assent of the non-party or where the party owes a legal duty of representation to the non-party. In *Richards*, this Court considered a challenge to a county occupation tax on behalf of employees subject to the tax. The Alabama Supreme Court held that the *Richards* plaintiffs' claims were barred by the judgment in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), a prior case challenging the tax which was not brought as a class action, and of which the *Richards* plaintiffs had no notice, because the *Bedingfield* plaintiffs, in the Alabama Supreme Court's view, had adequately represented the interests of the *Richards* plaintiffs.

This Court reversed, holding that the *Richards* plaintiffs were entitled to their day in court even though the *Bedingfield* plaintiffs had lost on the merits of their claim that a state tax was unconstitutional. It reasoned that even assuming "in some class suits adequate representation might cure a lack of notice," res judicata was not appropriate because the *Bedingfield* plaintiffs "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties." *Richards*, 517 U.S. at 801. The Court found "no reason to suppose that the *Bedingfield* court took care to protect the interests of [the *Richards* plaintiffs] in the manner suggested in *Hansberry*," or that "the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers." *Id.* at 802. Thus, it

concluded that a non-party may be bound by the results of a case only if a party to the case "assumed to exercise" the power of representing the non-party. *Id.* at 802 (quoting *Hansberry*, 311 U.S. at 46).

Subsequently, in *South Central Bell*, this Court held that a non-party could not be bound by a judgment in a prior suit even if the non-party knew of the prior litigation. The party and non-party must share a "special representational relationship," 526 U.S. at 168, that causes the party to recognize that the suit is on behalf of the non-party and, accordingly, to have an obligation to protect the non-party's interests. Absent such a relationship, the non-party and party "are best described as mere 'strangers' to one another"; and consistent with due process, the non-party "cannot be bound by the earlier judgment." *Id.* at 168.

Here, as in *Richards* and *South Central Bell*, Herrick "did not sue on behalf of a class; [his] pleadings did not purport to assert any claim against or on behalf of any nonparties; [] the judgment [issued] did not purport to bind any...[] nonparties"; and the district court and Tenth Circuit entertaining Herrick's suit did not "make any special effort 'to protect the interests of" nonparties. *South Cent. Bell Tel. Co.*, 526 U.S. at 167 (quoting *Richards*, 517 U.S. at 801-02). Taylor exercised no control over Herrick's suit, nor could he have: he had no actual or constructive notice of Herrick's suit during its pendency. Thus, just like the plaintiffs in *Richards* and *South Central Bell*, Taylor has no legal or special representational relationship with Herrick, such that he may be bound by the judgment in Herrick's case.

C. Preclusion based on the D.C. Circuit's virtual-representation rule is inconsistent with the Constitution

1. This Court recognized in *Richards* that "there are clearly constitutional limits on the 'privity' exception." 517 U.S. at 798. Those limits are set by the Constitution. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Due process prohibits estopping [non-parties] despite one or more existing adjudications of the identical issue which stands squarely against their position."); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *Postal Tel. Cable Co.*, 247 U.S. at 476 ("a state . . . cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.").

The Constitution affords every person with a claim an opportunity to be heard. *Richards*, 517 U.S. at 797. Because this

> right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest[,] . . . [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

> circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The holding of the court below, that the judgment in Herrick's case has preclusive effect against Taylor, was fundamentally unfair to him and violated his constitutional rights. The privity exception falls within constitutional bounds only when it is premised on the assent of the non-party or where the party owes a legal duty of representation to the non-party. *See South Cent. Bell Tel. Co.* 526 U.S. at 168; *Richards*, 517 U.S. at 802. In such instances, the non-party has had an opportunity to be heard in the first litigation. But the privity exception posited by the D.C. Circuit, premised on close association, adequate representation, and identical interests, exceeds constitutional bounds because it denies the non-party his *individual* due process right to be heard on the merits of his own claim. *See Boddie v. Connecticut*, 401 U.S. 371, 380 (1971) (recognizing that the right is an individual one). Specifically, such an exception denies the non-party his right to individual participation, adversarial justice, self, determination, and litigation autonomy, principles which Justice Frankfurter discussed in *Joint Anti-Fascist Refugee Committee v. McGrath*:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and

> opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). This Court has adhered to these principles in holding that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934). "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* These principles also warrant holding that a close association between a non-party and party is constitutionally insufficient to allow a judgment to stand against the non-party, as that party has never had an opportunity to be heard.

2. In considering the merits of Herrick's suit, the Tenth Circuit assumed two dispositive legal conclusions because Herrick failed to challenge them on appeal. *Herrick v. Garvey*, 298 F.3d 1184, 1194 n.10 (10th Cir. 2002). Taylor has a right to an opportunity to litigate the merits of those legal conclusions, which speak directly to whether the documents he seeks are protected as trade secrets and thus not subject to disclosure under FOIA.

Whether Taylor will succeed on the merits of his claim is not material to whether he has a right to an adjudication of the merits of his claim. "To one who protests against the taking of his property without due process of law, it is no answer to say

that in his particular case due process of law would have led to the same result." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). This is true regardless of one's opinion of the weight of the interest at stake. *Board of Regents v. Roth*, 408 U.S. 564, 569-71 (1972) (noting that the nature, not weight, of the interest at stake determines whether due process requirements apply).

Congress, in enacting FOIA, permitted each aggrieved individual to bring suit. These are "legitimate expectations worthy of protection by the Due Process Clause . . .[as they] stem from . . . the language of statutes." *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 471 (1989) (Marshall, J., dissenting) (citing *Vitek v. Jones*, 445 U.S. 480 (1980)). Accordingly, Taylor, a legal stranger to Herrick, is due his opportunity to be heard on the merits of his own FOIA claim.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JOHN VAIL, *Counsel of Record*
ANDRE M. MURA
CENTER FOR CONSITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
Counsel for Amicus Curiae

Date February 27, 2008

AMICUS CURIAE BRIEF

938 a
84
9
15 pgs

No. 07-371

FILED
FEB 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, AND FAIRCHILD CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN DENTAL ASSOCIATION IN SUPPORT OF PETITIONER

TAMRA S. KEMPF
C. MICHAEL KENDALL
AMERICAN DENTAL ASSOCIATION
21 East Chicago Avenue
Chicago, Illinois 60606

JACK R. BIERIG*
MICHELE A. CASEY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amicus Curiae

* Counsel of Record

February 26, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the doctrine of virtual representation automatically bind an organization or its members to the outcome of another member's prior litigation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF FACTS	2
ARGUMENT	3
A. If It Affirms, This Court Should Make Clear That The Doctrine of Virtual Representation Does Not Apply Simply Because Litigants In A Second Case Are Members Of *The Same Organization As A Litigant In The First Case*	3
B. Virtual Representation Cannot Be Derived Merely From Shared Membership In *An Association*	7
C. Permitting Virtual Representation Based On Membership In The Same Organization Would Deny Members Due Process Rights And Consume Valuable Judicial *Resources*	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Becherer v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999) 5
Bittinger v. *Tecumseh Prods. Co.*, 123 F.3d 877 (6th Cir. 1997) 5
Drake v. *FAA*, 291 F.3d 59 (D.C. Cir. 2002) ... 3
Hansberry v. *Lee*, 311 U.S. 32 (1940) 4
Herrick v. *Garvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002) 2
Hoblock v. *Albany County Bar. of Elections*, 422 F.3d 77 (2d Cir. 2005) 4
Irwin v. *Mascott*, 370 F.3d 924 (2004) 5, 6
Montana v. *United States*, 440 U.S. 147 (1979) 4, 8
Nevada v. *United States*, 463 U.S. 110 (1983) 3
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 3, 4
Richards v. *Jefferson County*, 517 U.S. 793 (1996) 3, 4, 7, 8
S. Cent. Bell Tel. Co. v. *Alabama*, 526 U.S. 160 (1999) 8
Taylor v. *Blakely*, 490 F.3d 965 (D.C. Cir. 2007) ..... *passim*
Taylor v. *Blakely*, No. Civ.A. 03-0173 (RMU), 2006 WL 279103 (D.D.C. Feb. 6, 2006) 2
Tice v. *Am. Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1999) 5, 9

STATUTES

5 U.S.C. § 552 2

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

18A Charles Alan Wright, Arthur R. Miller et al., *Federal Practice and Procedure* § 4456 (2d ed. 2002) 5

Restatement (Second) of Judgments § 41 (1980) 3, 4

INTEREST OF THE *AMICUS CURIAE*

The American Dental Association (ADA) is a professional association of dentists committed to advancing the oral health of the public and the interests of its members. With a membership of more than 150,000 dentists, the ADA is the largest dental association in the United States. Given the size and diversity of its membership, the ADA seeks to ensure that the doctrine of "virtual representation" is not construed so that the result in a suit brought by one of its members necessarily binds other members, or the organization itself, in subsequent litigation.

To expand the doctrine of "virtual representation" so broadly would, in effect, create a mandatory intervention rule. The ADA would have to monitor thousands of courts across the country to make sure it intervened each and every time one of its members went to court on an issue of importance to other members. Other national professional associations, like the American Bar Association (ABA) and the American Medical Association (AMA), would face a similar scenario. That state of affairs would, of course, be highly inefficient and impracticable.

The ADA, therefore, respectfully submits that the decision below should either be reversed or carefully limited to the unique facts of the case. The ADA respectfully asks this Court to restrict the scope of the doctrine of virtual representation so that the doctrine does not, in effect, transform a large professional association into a putative class automatically represented by the interests of any one member.[1]

---

[1] All parties have consented to this amicus brief as evidenced by the consent letters attached hereto for filing with the Court.

STATEMENT OF FACTS

Petitioner Brent Taylor, executive director of the Antique Aircraft Association (AAA), brought suit in the District Court for the District of Columbia on February 3, 2003, to obtain records he had unsuccessfully requested from the Federal Aviation Administration (FAA) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *Taylor* v. *Blakely*, No. Civ.A. 03-0173 (RMU), 2006 WL 279103, at *1 (D.D.C. Feb. 6, 2006). The records relate to a 1935 vintage airplane, the F-45. *Id.* Greg Herrick, another AAA member, had previously made a separate FOIA request for records related to the airplane a few years earlier. After his request was denied, he appealed unsuccessfully first to the District of Wyoming and then to the Tenth Circuit. See *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002).

In the district court here, the FAA and defendant-intervenor Fairchild Corporation, manufacturer of the F-45 aircraft, moved for summary judgment against Taylor. They argued, among other things, that although Taylor was not a party to Herrick's earlier lawsuit, his claims were barred by res judicata. The district court agreed. 2006 WL 279103, at *8. The Court of Appeals affirmed, citing the doctrine of virtual representation. It concluded, on the facts of this case, that the district court's decision was proper because Herrick was Taylor's "virtual representative." *Taylor* v. *Blakely*, 490 F.3d 965, 976-77 (D.C. Cir. 2007). The court acknowledged that

---

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

litigants are not usually bound by prior suits to which they were not parties. However, it held that "a nonparty's claim [can be] precluded by a prior suit based upon a particular form of privity known as 'virtual representation.'" *Id.* at 971. Taylor appealed, and this Court granted certiorari on January 11, 2008.

ARGUMENT

A. If It Affirms, This Court Should Make Clear That The Doctrine of Virtual Representation Does Not Apply Simply Because Litigants In A Second Case Are Members Of *The Same Organization As A Litigant In The First Case.*

As this Court has remarked, the United States has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (internal citations omitted). However, under the doctrine of res judicata, a judgment on the merits in a prior suit can bar a second suit not only involving the same parties but also those "in privity" with the parties if the cause of action is the same. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 5, (1979); *Drake* v. *FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002). A party in privity with another, therefore, can be bound to the outcome of another party's "day in court."

Traditionally, privity between parties exists only when a person not a party to an action is represented by a party and is bound and entitled to the benefits of the resulting judgment as though he were a party. *Restatement (Second) of Judgments* § 41 (1980); see also *Nevada* v. *United States*, 463 U.S. 110, 134-35 (1983). A person can be represented by a party who is, for example, the trustee of an estate or interest of

which the person is a beneficiary; or an official or agency invested by law with authority to represent the person's interests; or the representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member. *Restatement* § 41.

Privity has traditionally been found only in limited circumstances in which the interests of a non-party to the original litigation have been adequately represented by a party accountable to that non-party. *Richards*, 517 U.S. at 798. This Court has found privity in the class action context, for example, see *id.*; *Hansberry* v. *Lee*, 311 U.S. 32, 43 (1940), and when the second party controls the original litigation on behalf of one of the parties to that litigation. *Montana* v. *United States*, 440 U.S. 147, 155 (1979) (holding that government was bound by prior litigation of federal contractor when, among other things, it read and reviewed the complaint, paid the attorney's fees and costs, and directed the course of the litigation).

Here, Taylor and Herrick were not in privity with each other in the traditional sense of the word. Neither was the agent of the other. Nor had they entered into a formal contract of any type. Without privity, res judicata cannot bar Taylor's suit. *Taylor*, 490 F.3d at 970; *Parklane Hosiery*, 439 U.S. at 326 n.5. Upon the suggestion of respondents, however, the Court below considered whether Taylor and Herrick could be considered in privity with one another under the doctrine of virtual representation.

The virtual representation doctrine is "controversial," *Hoblock* v. *Albany County Bar. of Elections*, 422 F.3d 77, 90 (2d Cir. 2005), and the approaches to the doctrine taken by circuit courts vary widely. *Taylor*, 490 F.3d at 971 (discussing

circuit split). Typically, virtual representation is used to expand the reach of privity beyond its traditional scope, binding parties who would not, under standard definitions, be in privity with each other. *Id.*

The doctrine therefore "reflects a tension between competing interests" in fundamental due process fights and judicial efficiency. *Becherer* v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 431 (6th Cir. 1999) (en banc) (Moore, J., concurring). As the Seventh Circuit has stated, the term "virtual representation. . . illustrates the harm that can be done when a catchy phrase is coined [and]... starts being applied to situations far removed from its intended and proper context." *Tice* v. *Am. Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir. 1999); see also *Bittinger* v. *Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997); 18A Charles Alan Wright, Arthur R. Miller et al., *Federal Practice and Procedure* § 4456, at 512 (2d ed. 2002) ("Impatience with repetitive litigation of common issues ... has enticed some courts to rely on virtual representation in circumstances that go beyond anything that is easily justified"). Indeed, the *Taylor* court noted that virtual representation, unchecked, could sacrifice a litigant's day in court in favor of judicial efficiency: "Too readily to find virtual representation risks infringing upon the nonparty's right to due process of law and departs from our 'deep-rooted historic tradition that everyone should have his own day in court,'" 490 F.3d at 971 (quoting *Richards*, 517 U.S. at 798).

After surveying different approaches taken by its sister circuits, the *Taylor* court devised a two-part virtual representation test largely drawn from the Ninth Circuit's five-factor approach in *Irwin* v.

Mascott, 370 F.3d 924, 930 (2004). First, the court concluded that "identity of interests" and "adequate representation" were necessary prerequisites to virtual representation. In addition, one of three additional factors must be present: 1) a close relationship between the present party and his putative representative, 2) substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment. *Taylor*, 490 F.3d at 971-72.

Although the court ultimately found that Taylor's relationship with Herrick satisfied this new test and barred his claim, it did not base its conclusion on the two men's membership in the AAA. To the contrary, the court stressed the pair's close personal relationship, the fact that they shared an attorney and information gathered during discovery, and may have had an agreement to restore Taylor's F-45 plane:

> [T]he record before us indicates *Herrick and Taylor were not merely people who happened to share a common interest and membership in the same organizations*, but knew each other quite well: Herrick asked Taylor to assist him in restoring his F-45, provided information to Taylor that Herrick had obtained through discovery, and at summary judgment Taylor did not oppose Fairchild's characterization of Herrick as his 'close associate.'

Id. at 975 (emphasis added).

Indeed, the court was careful to limit its holding to the specific facts presented. It was careful to note that different circumstances (for example, a situation where the *only* commonality between the parties was

membership in a given organization) would generate a decidedly different result:

> The record here, as we have noted, contains evidence suggestive of identical interests, adequate representation, and a close relationship and no evidence to the contrary. *Matters might look different if Taylor had submitted evidence* before summary judgment explaining, for example, why their common counsel's representation of Herrick did not adequately represent Taylor's interests, or *demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations*, or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents. *He did not do so*, however, with the result that the record supports finding Herrick and Taylor in privity.

Id. at 976-77 (emphasis added).

This Court, if it chooses to clarify the scope of virtual representation, should be careful to make clear that it does not apply based simply on joint membership in an organization.

B. Virtual Representation Cannot Be Derived Merely From Shared Membership In *An Association*.

The ADA's position – that membership alone cannot generate virtual representation – is squarely in line with this Court's prior opinions. For example, in *Richards* v. *Jefferson County*, 517 U.S. at 801, this Court held that, absent a sufficient relationship between the parties to the first and second litigation, parties who neither participated in, nor had the

opportunity to participate in, earlier litigation cannot be bound by that litigation.

The *Richards* Court considered whether a challenge to a county tax was barred by a previous case in which other taxpayers had challenged the same tax. Noting that the parties to the first suit "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties," the Court found "no reason to suppose that [the court deciding the first case] took care to protect the interests" of the parties to the second case. Nor did the plaintiffs in the first case understand "their suit to be on behalf of absent county taxpayers." *Id.*; cf. *S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 168 (1999) (finding no "special representational relationship" between Southern Central Bell Telephone Company and a group of different corporations that brought an earlier suit against the state, despite the fact that Southern Bell was aware of the earlier litigation and shared an attorney with the litigants in the prior suit).

The *Richards* and *Southern Bell* decisions support the ADA's position that neither its rights, nor the rights of its members, to a day in court should be eliminated de facto by a member's earlier litigation. Indeed, this Court has bound an organization to the outcome of a prior member's litigation only when it was plain that the organization directed, controlled and funded the earlier case. See *Montana* v. *United States*, 440 U.S. 147, 152 (1979) (holding that the government's in-depth involvement in the prior litigation of a federal contractor was binding because "although not a party, the United States plainly had

a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel") (citing *Drummond* v. *United States*, 324 U.S. 316, 318 (1945)).

C. Permitting Virtual Representation Based On Membership In The Same Organization Would Deny Members Due Process Rights And Consume Valuable Judicial *Resources.*

The ADA enjoys a large and diverse membership. Neither the Association nor its members expect to cede their day in court based on action by another member. Indeed, if shared membership gave rise to virtual representation, it would transform professional societies into putative standing "classes" without Rule 23 protections. See *Tice*, 162 F.3d at 973. In other words, if mere membership were enough to give rise to virtual representation, any individual member – with any agenda, whether or not aligned with the organization – could, in essence, subject the organization and its other members to a ruling that denied them due process and their day in court. *Id.*

To foreclose the possibility of being unwittingly bound (and having their members bound) by another member's litigation, professional organizations would have to engage in mandatory monitoring of litigation in every court. The *Taylor* court cautioned against this result. 490 F.3d at 971. Such monitoring would unnecessarily consume the resources of professional organizations and courts across the country.

CONCLUSION

The ADA respectfully requests that, in addressing the virtual representation doctrine, this Court clarify that mere membership in an organization does not give rise to virtual representation.

Respectfully submitted,

TAMRA S. KEMPF
C. MICHAEL KENDALL
AMERICAN DENTAL ASSOCIATION
21 East Chicago Avenue
Chicago, Illinois 60606

JACK R. BIERIG*
MICHELE A. CASEY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amicus Curiae

February 26, 2008

* Counsel of Record

RECORD PRESS, INC., 229 West 36th Street, N.Y. 10018—21560—(212) 619-4949
www.recordpress.com

AMICUS CURIAE BRIEF

84 434 B (10)
25 pgs 07-371

FILED
FEB 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

—v.—

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CIVIL PROCEDURE AND COMPLEX LITIGATION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

David L. Shapiro
Harvard Law School*
1565 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4618

Counsel of Record and Amicus

John Leubsdorf
Rutgers Law School-Newark*

Howard M. Erichson
Seton Hall Law School*

Counsel and Amici

(Additional Amici Listed on Inside Cover)

Stephen B. Burbank
University of Pennsylvania Law School*

Kevin M. Clermont
Cornell Law School*

Geoffrey C. Hazard, Jr.
University of California Hastings College of the Law*

Samuel Issacharoff
New York University Law School*

Arthur Miller
New York University Law School*

William Rubenstein
Harvard Law School*

Patrick Woolley
University of Texas Law School*

Amici

**Law school affiliations are stated for identification only.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. A Judgment Does Not Bind A Nonparty Except In Several Well-Justified and Clearly Delineated Circumstances That Are Absent Here 2

II. Nonparty Preclusion Violates Joinder Principles and Creates A De Facto Class Action Without The Safeguards of Rule 23 8

III. The D.C. Circuit's Use of "Virtual Representation" Relied On A Grab-Bag of Factors Without A Sound Rationale and Would Prove Burdensome in Application 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page(s)**

Armstrong v. Manzo, 380 U.S. 545 (1965)..... 2

Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971).....2,3

Federated Dept. Stores v. Moitie, 452 U.S. 394, 401 (1981).....16

Hansberry v. Lee, 311 U.S. 32 (1940)..... 3

Martin v. Wilks, 490 U.S. 755 (1989)..... 2, 5, 8, 9

Montana v. United States, 440 U.S. 147 (1979)..... 4

Pennoyer v. Neff, 95 U.S. 714 (1878).....2

Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918).....2, 5

Richards v. Jefferson County, 517 U.S. 793 (1996).....2, 4, 5, 6, 7

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001)..... 3

South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999).....2, 7, 15

Taylor v. Blakey, 490 F.3d 965 (D.C. Cir 2007).....11

Tice v. American Airlines, 162 F.3d 966 (7th Cir. 1998)..... 11

Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997)..... 13

United States v. Mendoza, 464 U.S. 154 (1984)..... 10, 18

Zenith Radio Corp v. Hazeltine Research, Inc., 395 U.S. 100 1969).....2, 4

Statutes and Rule:

5 U.S.C. § 552(a)(3)(A),(a)(4)(B).....6

42 U.S.C. § 2000e-2(n)(1)..... 5

Fed. R. Civ. P. 19(a)(1)(B)(i).....17

Article, Restatement, and Treatises:

David L. Shapiro, Preclusion in Civil Actions (2001).....13, 16

Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 Duke L.J. 381(2000).....10, 17

James, Hazard & Leubsdorf, Civil Procedure (5th ed. 2001)..... 13

Restatement (Second) Judgments.....4, 5

18A Wright, Miller & Cooper, Fed. Practice & Procedure (2d ed. 2002)..... 4, 13, 15, 16

STATEMENT OF INTEREST

The *amici* submitting this brief teach and write about Civil Procedure and Complex Litigation. We have no financial interest or involvement (except for this brief) in this or any other pending action raising the issues discussed here. Rather, we submit this brief out of concern for the proper development of the law of judgments, due process, and joinder.[1]

SUMMARY OF ARGUMENT

With rare exceptions, a judgment does not bind a nonparty. The law of judgments departs from this principle only in narrowly defined exception that are inapplicable her and are backed by clear and limited justifications. Nonparty preclusion, as applied by the courts below, violates joinder principles and creates a de facto class action without procedural or ethical safeguards. The decision of the Court of Appeals in this case lacks a cogent rationale, relying on a collection of factors that will prove burdensome to apply and that in any event cannot justify a departure from the most basic limits on adjudicatory power, a departure that would run squarely counter to the demands of due process of law.

---

[1]All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief. Other than the amici on whose behalf this brief is submitted and their counsel, no person or entity made any monetary contribution to the preparation of this brief except that N.Y.U. Law School paid for printing and mailing the brief.

ARGUMENT

I. A Judgment Does Not Bind A Nonparty Except In Several Well-Justified and Clearly Delineated Circumstances That Are Absent Here.

A central tenet of our procedural system is that nonparties cannot be bound by a judgment. *See, e.g.,* South Central Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68 (1999); Richards v. Jefferson County, 517 U.S. 793, 798 (1996); Martin v. Wilks, 490 U.S. 755, 761 (1989); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Pennoyer v. Neff, 95 U.S. 714, 733-34 (1878). The rule against binding nonparties is embodied in the law of judgments that applies here, but it has its foundation in the Due Process Clause as well. Binding a nonparty deprives that person of essential due process protections such as the right to appear by counsel, to introduce evidence, to present arguments, and to cross-examine. *See, e.g.,* Armstrong v. Manzo, 380 U.S. 545 (1965). As this Court has said, "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their positions." Blonder-Tongue

Laboratories v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).[2]

The general rule against binding nonparties admits of several exceptions, but for each exception, courts wisely have insisted upon sound justifications and well-drawn lines. A brief survey of the exceptions shows that each is based on a clear and limited rationale, not on a diffuse balancing of factors. Class actions, control of an action by a nonparty, privity, and some legislation creating special proceedings create permissible forms of nonparty preclusion, none of which applies in this case.

1. Class actions offer the broadest exception to the rule against binding nonparties, premised on class certification and adequate representation. Hansberry v. Lee, 311 U.S. 32, 39 (1940). Such a proceeding requires special grounds and special safeguards, including contemporaneous designation as a class action. As this Court has observed, "a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the

---

[2] Although due process concerns strongly support the Petitioner's position that he is not bound by the judgment in an action to which he was not a party, the Court can reverse the decision below without reaching the Constitutional question. This case concerns the preclusive effect of a federal court judgment, deciding a federal question claim, on an action in another federal court. That issue is governed by federal common law. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506-09 (2001). And the federal common law of judgments does not permit nonparty preclusion except in narrowly defined circumstances not applicable to this case.

common issue.'" Richards v. Jefferson County, 517 U.S. 793, 801 (1996). Those requirements are not met when the parties to the first suit "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any . . . [persons] who were nonparties." *Id.* Part of this brief more fully explains how "virtual representation," as applied by the lower courts in this case, disregards sound limitations on class actions.

2. When a nonparty controls litigation, that nonparty may be bound as a party. This narrow exception applies when "nonparties assume control over litigation in which they have a direct financial or property interest," so that the nonparties have in effect had their day in court and can appropriately be bound by the result. Montana v. United States, 440 U.S. 147, 154-55 (1979); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 111 (1969). In the *Montana* case, the United States was bound by the issue-preclusive effect of a judgment in an action brought by a government contractor because the United States had directed the contractor to file the suit, paid the attorneys, and controlled most of the litigation decisions. 440 U.S. at 155. The *Montana* exception justifies nonparty preclusion in a narrow band of cases where, for example, a liability insurer controlled an insured's defense of a prior case or a corporation controlled litigation involving one if its officers. 18A Wright, Miller & Cooper, Federal Practice and Procedure § 4451 (2d ed. 2002); Restatement (Second) Judgments § 39 cmt. a, illus. 1 & 2.

3. Courts have used the notion of "privity" to treat nonparties as equivalent to parties for purposes of the law of judgments, but they have been careful to limit the doctrine to circumstances in which the legal relationship between a party and a nonparty may warrant treating the nonparty's rights and obligations as derivative from those of the party. For example, when a landowner subject to a judgment affecting the land sells to a new owner, courts conclude that "the estoppel runs with the land, that the grantor can transfer no better right or title than he himself has, and that the grantee takes *cum onere*." Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 474-75 (1918). Other legal relationships may tie a nonparty's rights to those of a party, such as when a judgment against a partnership binds each partner, or when a guardian litigates on behalf of a ward. See Restatement (Second) Judgments §§ 43-61. In each case, a specific legal relationship between the party and nonparty justifies treating the nonparty as the party's equivalent for purposes of claim preclusion and issue preclusion.

4. Finally, the legislature may, subject to due process limits, modify the law of preclusion so that a single proceeding may bind all interested persons upon notice and an opportunity to be heard. See Richards v. Jefferson County, 517 U.S. 793, 802-05 (1996); Martin v. Wilks, 490 U.S. 755, 762 n. 2, 765-66 (1989)(mentioning bankruptcy and probate proceedings); 42 U.S.C. § 2000e-2(n)(1)(limiting challenges to practices imposed under employment discrimination decrees). In such instances, the legislature has decided that consolidation is necessary; it has enacted appropriate procedural safeguards; and

the statute itself warns those interested that they cannot protect themselves except by participating.

None of these exceptions applies here. Greg Herrick's FOIA action in the District of Wyoming was not a certified class action. There is no suggestion that Brent Taylor controlled Herrick's FOIA litigation; indeed, there is no evidence that he even knew about it while it was proceeding. There is no legal relationship of the sort properly classed as privity that justified making Taylor's rights depend on those of Herrick for purposes of claim preclusion or issue preclusion. Finally, this case does not involve any legislative alteration of the law of judgments. On the contrary, FOIA entitles "any person" to seek the disclosure of government documents by suing in the District of Columbia, where the claimant resides or has his principal place of business, or where the documents are located. 5 U.S.C. § 552(a)(3)(A), (a)(4)(B).[3]

This case is governed by Richards v. Jefferson County, 517 U.S. 793 (1996), which held that someone challenging a state tax cannot consistently with

---

[3] Although the court below did not rely on this ground, the United States (FAA) relied heavily in its brief on an argument that FOIA was a "public law," and thus a nonparty to a prior judgment could be bound by that judgment. Whatever the merits of that amorphous and untested concept, it has no place here. First, it bears no relationship to the "virtual representation" theory adopted below, since it would bind the entire world to the prior judgment. Second, the interests at stake in the present action are not of the kind that could qualify under such a standard. The right to information under FOIA is a right that Congress vested in the individual seeking the information, who may or may not choose to disclose that information to others once it has been obtained.

due process be bound by a previous decision upholding it when: (a) he received no notice of the previous case; and (b) the party challenging the tax in the previous case was not designated a class representative or otherwise designated to represent the interests of nonparties. Indeed, the Court later held that, even when the nonparty knew of the first case and the same lawyer participated in representing both challengers to the tax, the nonparty could not constitutionally be bound. "These circumstances, however, created no special representational relationship between the earlier and later plaintiffs. Nor could these facts have led the later plaintiffs to expect to be precluded, as a matter of res judicata, by the earlier judgment itself, even though they may well have expected that the rule of law announced in . . . [the first case] would bind them in the same way that a decided case binds every citizen." South Central Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68 (1999).

Even in a case unlike this one, in which a nonparty receives notice of the pending action, procedures must be in place in that action to ensure adequacy of representation and provide fair notice that the nonparty will be bound. A post hoc effort to determine adequacy will not suffice. In the absence of a legal relationship between party and nonparty causing the latter's rights to depend on the former's, that may be accomplished by certifying a class, designating class representatives, and providing other safeguards. But this must be done at the time of the first suit, not by a decision in a second suit that the first suit should retroactively be treated as a class action. *Richards*, 517 U.S. at 801-02.

II. Nonparty Preclusion Violates Joinder Principles and Creates A De Facto Class Action Without The Safeguards of Rule 23.

The Federal Rules of Civil Procedure offer a panoply of options for joining parties to an action. A properly joined party has the right to participate in the action and is bound by the judgment, whether favorable or unfavorable. Each joinder provision entails somewhat different requirements and procedures, crafted to accommodate each type of joinder and to protect the legitimate interests of those joined or not joined. To bind a person who was not properly joined as a party permits an end run around the joinder rules.

As this Court has recognized, the burden of joining those to be bound by an action falls on those who are already parties. The enduring point of *Martin v. Wilks*, 490 U.S. 755 (1989), is that nonparties are not bound by a judgment simply because they could have joined. Intervention, this Court emphasized in *Martin*, is not mandatory. If a party to an action wishes to bind a nonparty, that party must use an appropriate joinder mechanism to make the outsider a party to the action. *Id.* at 763-65. If the nonparty is then joined, it knows that it will be bound; and if it is not joined, it knows that it will not be bound and can safely remain outside the action.

Thus, the white firefighters in *Martin* were free to bring a second suit challenging the consent decree resulting from the first suit even though (a) they had surely been aware of that suit (a publicized class action against their employer) during its pendency, (b) the municipal defendants had contested liability through two trials, (c) the white firefighters

knew that the affirmative action sought by the suit would affect them, and (d) the Birmingham Firefighters Association had appeared and objected to the decree as an *amicus*. Indeed, the dissenters agreed with the majority's holding that the firefighters were not bound by the judgment in the first suit; they argued that the employer was not liable as a matter of substantive law for acts performed in obedience to a court order. *Id.* at 770, 772-73, 789-91.

Alternatively, the defendants might have sought relief against those likely to seek the records in question under FOIA. Perhaps this might have taken the form of a counterclaim against Herrick, naming as additional parties to the counterclaim Taylor and other members of the antique aircraft association. Or it might have had the form of an independent action against them, seeking certification of a defendant class for purposes of a determination that FOIA did not warrant release of the records. It is not clear whether a representative appropriate to protect the interests of such a defendant class could be identified, or whether there might be other reasons to deny certification, but that is precisely the point. Unless a party succeeds in joining a person who is a stranger to the litigation as a named party, or successfully includes him in a class action, that person cannot be bound by the adjudication.

As *Martin* made clear, 490 U.S. at 766-68, questions about the form a class action might have taken cannot serve as the basis for binding nonparties to the result in a prior action. If parties decline to avail themselves of the mechanism the law provides, with its attendant costs and risks, then they lose the advantage of binding the entire class when

the judgment proves favorable to them. *See* Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 Duke L.J. 381, 459 (2000).

Had the Herrick lawsuit been a legitimate class action, it would have differed in procedurally and ethically salient ways. The court would have certified the class only on compliance with rules meant to ensure commonality of interest and impracticality of individual suits. Specification of the class would have informed representatives whom they were representing, and courts and class members who was to be bound. The class representatives, their counsel, and the court itself would have been obligated to protect the interests of absent class members. Class members would have had an opportunity to be heard, would share in the benefits of any favorable judgment, and would be bound by an unfavorable one.[4]

Nonparty preclusion, as applied by the lower courts in this case, retroactively created a de facto class action without the many safeguards of class action procedure. Although the lower courts' opinions fail to specify who is included in the "class" bound by the original judgment against Herrick, the class might include at least those who, like Taylor, shared a similar interest in the F-45 aircraft and were related to Herrick through membership in an antique airplane association. Thus, the Court of Appeals up-

---

[4] Nonparties to a class or nonclass FOIA action could not obtain its benefits by invoking non-mutual issue preclusion, because such preclusion is not available against the government. United States v. Mendoza, 464 U.S. 154 (1984).

held nonparty preclusion against Taylor based on an ex post finding that Taylor was adequately represented by Herrick and his attorney, noting that "it is eminently reasonable to believe an individual with a strong incentive to litigate a particular matter, by defending his own interest adequately represents others with the same interest." Taylor v. Blakey, 490 F.3d 965, 974 (D.C. Cir. 2007). That statement may echo the rationale supporting class actions, but Herrick's suit was not a class action.

Moreover, adequate representation is *necessary* for a class action but has never been *sufficient.* A finding of adequate representation neither supplants the other requirements for class certification nor renders superfluous all of the procedural and ethical protections built into class representation. "[T]he fact that virtual representation looks like a class action but avoids compliance with Rule 23 is a weakness, not a strength, of the doctrine. ... There would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will." Tice v. American Airlines, 162 F.3d 966, 972-73 (7th Cir. 1998).

III. The D.C. Circuit's Use of "Virtual Representation" Relied On A Grab-Bag of Factors Without A Sound Rationale and Would Prove Burdensome in Application.

The Court of Appeals decision in this case was not based on any clear and limited rationale such as those that justify the traditional grounds for binding nonparties. Rather, the court relied on three factors to conclude that, even though Brent Taylor had not

been a party to a previous FOIA action brought by Greg Herrick or was even shown to have had notice of it while it was going on, claim preclusion nevertheless barred his own action. These factors—that Herrick's interest in seeking the aircraft plans in question was at least as great as Taylor's, that both had retained the same lawyer, and that they were in a "close relationship" encompassing membership in aviation associations—the court considered sufficient for nonparty preclusion.

The theory said to justify this result was "virtual representation," a controversial and ill-defined theory of preclusion that lacks a clear and limited justification. With its statement that "[c]ourts now generally hold a nonparty's claim precluded by a prior suit based upon a particular form of privity known as 'virtual representation,'" 490 F.3d at 970, the Court of Appeals gave no hint of the extent to which the theory departs from standard preclusion doctrine.

Although Taylor never asked Herrick to represent him, Herrick never agreed to do so, and the court hearing the first action never commissioned Herrick to do so, the court's theory would treat Herrick as though he had been Taylor's representative all along. The representation is pure fiction.[5] If a theory of "virtual representation" can ever justify claim preclusion of nonparties, it must be a theory

---

[5] Indeed, outside the law of judgments, "virtual representation" designates the theory under which people like the American colonists who could not vote for Parliament were said to be virtually represented by members elected by others—a theory that the Revolution repudiated.

supported by a genuine rationale, not just the factors described in this case. Some decisions, for example, have held to be bound by "equitable preclusion" one who knew that a prior action involving the same claim was pending, could have joined it, and knew that a party to that prior action relied on it to dispose of the controversy. James, Hazard & Leubsdorf, Civil Procedure 738-39 (5th ed. 2001). But that example (whatever its merits) is not this case.

One of the cases cited by the court, Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), *cert. denied,* 520 U.S. 1166 (1997), has hitherto been regarded as "perhaps the most extreme example of the 'new frontier.'" David L. Shapiro, Preclusion in Civil Actions 94 (2001); *see also* 18A Wright, Miller & Cooper, Federal Practice and Procedure 546-49 (2d ed. 2002) (calling *Tyus* "[a]s broad a statement of virtual representation doctrine as is likely to be made" and criticizing its failure to consider the actual adequacy of representation). *Tyus* represents a departure from usual preclusion principles that this Court should not follow. The present case, moreover, goes further than *Tyus.* In *Tyus,* most of the plaintiffs in the second case as well as their lawyer not only knew of but actually participated in the first suit, from which they withdrew in order to file the second one. Even were the result in *Tyus* sound, preclusion in the present case remains unjustifiable.

The sponginess of the "virtual representation" claim advanced here becomes still clearer when one examines the foundations of the "close relationship" on which the decision below relied. The facts adduced in the opinion are that both Herrick and Taylor were members of an antique aircraft association,

that they shared an interest in preserving antique aircraft, that Herrick asked Taylor to help him restore his F-45 (though there is no evidence of Taylor's response), that after the first suit ended Taylor obtained discovery materials from Herrick, and that Taylor did not make a timely objection (though he did make an untimely one) to a characterization of him as Herrick's "close associate." None of this demonstrates that Taylor authorized Herrick to litigate on his behalf, that Herrick was himself acting as Taylor's agent, that Herrick and Taylor colluded with the purpose of obtaining two bites at the apple, or that any other occurrence made it appropriate to bind Taylor by Herrick's lawsuit. One could say with equal truth that two corporations litigating about a statute are both Business Roundtable members who have many transactions with each other, cooperate in legislative matters, and use the same law firm. Yet such miscellaneous ties have never been thought sufficient to support claim preclusion.

As for the claim of adequate representation, even if that were sufficient in itself, it has not been established here. None of the safeguards to assure adequacy, such as those in Rule 23, was in place. No finding of adequacy was made in the original proceeding, nor was it required, and in the second proceeding the courts in effect created an irrebuttable presumption that a party was properly represented by another party with similar interests and the same lawyer. Arguments are presented in Taylor's action that were not presented in Herrick's action. The fact that the same attorney was involved in both actions cannot suffice in itself to preclude litigation, any more than the eminence of the lawyer or firm involved in a previous action would preclude others

from litigating overlapping issues. South Central Bell Tel. Co., 526 U.S. at 168; 18A Wright, Miller & Cooper, Federal Practice and Procedure 376 n. 14 (2d ed. 2002)(citing cases).

A client in one proceeding may have reasons for not advancing arguments that the client in the second proceeding does not. The client in the second proceeding may have resources and access to information that the client in the first proceeding did not. The interests at stake in the present case are those of the client, not the lawyer. Reliance on use of the same attorney as a basis for nonparty preclusion would simply limit the choice of counsel available to the second plaintiff.

In short, both the D.C. Circuit's appraisal of the factors on which it relied and its conclusion that those factors warrant preclusion fail to articulate any clear or bounded rationale explaining why these particular circumstances justify depriving Taylor of the day in court guaranteed by the law of judgments and the due process clause. Nor does the opinion give any weight to the absence of other factors that courts have considered relevant, in particular, the absence of any showing that Taylor knew of the first suit, had any hand in its conduct, agreed to be bound by its result, or deliberately maneuvered to avoid its effects.

This case illustrates why a leading authority has warned against the dangers of "virtual representation" theories:

> Impatience with repetitive litigation of common issues, however, has enticed some courts to rely on virtual representation in circum-

> stances that go beyond anything that is easily justified. . . . There are enough vagrant decisions on the loose to raise genuine concern that, for want of any developed theory, virtual representation will be used to preclude bothersome litigation that instead should be resolved on the merits.

18A Wright, Miller & Cooper, Federal Practice and Procedure 512-513 (2d ed. 2002); *see also* David L. Shapiro, Preclusion in Civil Actions 97 (2001). As this Court has said, "'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determinations of the equities in a particular case." Federated Dept. Stores v. Moitie, 452 U.S. 394, 401 (1981).

Not only does the D.C. Circuit's version of "virtual representation" lack any sound rationale, its amorphousness would create new problems. The variety of "virtual representation" in question here would invite long and burdensome proceedings to determine whether its requirements had been met. Parties could seek discovery into such matters as what someone knew about a previous suit, what connections existed between him and a party to that suit, and how his interests might differ from those of that party. Then parties could dispute how the various factors sometimes considered relevant should be balanced in the particular case. That would lay the foundations for appeals as to whether a particular agglomeration of factors warranted preclusion.

The effects of the doctrine would reach back to complicate proceedings in the forum in which the

first suit was brought. Thus, a party to the first suit might contend that one who would or might be bound by the result should be joined if possible under Fed. R. Civ. P. 19(a)(1)(B)(i), or that if she could not be joined the suit should be dismissed under Rule 19(b), or that the suit should be transferred to another district so that she could be joined. Adjudicating such assertions would take time and money.

The potentially bound party would also be burdened. Some such parties might find it necessary to protect their interests by looking for and monitoring suits that might later be held to bind them. Successful intervention in such suits might be costly or inconvenient, particularly if they were pending in distant venues or if the intervenor raised new issues or sought additional discovery. Someone who decided not to intervene but to bring a separate suit would be well advised to hold aloof from the parties in the first suit, to retain a different lawyer who might have to be paid to educate himself, and to obtain information through expensive discovery procedures rather than by asking a party to the first suit for it. *See* Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 Duke L.J. 381, 458 (2000) (criticizing "virtual representation" theory as discouraging cooperation among counsel).[6]

---

[6]In an analogous situation, this Court stressed another disadvantage of expanding preclusion doctrine. In holding that nonmutual issue preclusion could not be applied against the United States, the Court said that such preclusion "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final

(*Footnote continued*)

If the Executive Branch believes that multiple actions involving FOIA requests for the same records create a real problem that cannot be resolved through proper use of existing procedural techniques, it should ask Congress to consider appropriate means of allowing a single FOIA action to bind all those who seek such records. Congress could then conduct an inquiry into whether there is indeed such a problem, whether it wished to impair or nullify the individual rights now conferred on those seeking records, and whether and in what form of proceeding adequate safeguards can be established to ensure constitutionally adequate representation, notice, and opportunity to be heard. But the Respondents may not turn an ordinary federal civil action into such a proceeding by contending, after judgment has been entered, that common interests, the same lawyer, and connection through the antique aircraft community made the first plaintiff an unwitting representative of the second.

CONCLUSION

The theory of "virtual representation," as applied by the courts below, does violence to well-established principles of joinder, preclusion, and due process. Whatever the merits of petitioner's FOIA claim, Congress has entitled him to litigate it him-

---

adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari for certiorari." United States v. Mendoza, 464 U.S. 154, 159 (1984).

self, without being bound by a proceeding of which he received no notice, and in which no one was designated to speak for him. The factors present in this case, or any grab-bag of factors without a sound and circumscribed rationale, cannot justify a departure from the essential principle that a judgment does not bind a nonparty. The due process protections afforded to parties or class members – and denied to nonparties and non-class members – should not be so lightly disregarded. The judgment below should therefore be reversed.

Respectfully submitted,

David L. Shapiro
Harvard Law School*
1565 Massachusetts Avenue
Cambridge, MA 02138
(Tel. 617 495-4618)

Counsel of Record and Amicus

John Leubsdorf
Rutgers Law School-Newark*

Howard M. Erichson
Seton Hall Law School*

Counsel and Amici

Stephen B. Burbank
Univ. of Pennsylvania Law School*

Kevin Clermont
Cornell Law School*

Geoffrey C. Hazard, Jr.
University of California, Hastings
College of the Law*

Samuel Issacharoff*
N.Y.U. Law School

Arthur Miller
N.Y.U. Law School*

William Rubenstein
Harvard Law School*

Patrick Woolley
University of Texas Law School*

Amici

February 2008

*Law school affiliations are stated for identification only.

AMICUS CURIAE BRIEF

84
59800 B
36 pgs

No. 07-371

FILED
FEB 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENT TAYLOR,
Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, ET AL.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR LAVONNA EDDY AND KATHY LANDER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAMES A. FELDMAN *
3750 Oliver Street, N.W.
Washington, D.C. 20015
(202) 686-6607

GERALD S. HARTMAN
MARY E. KOHART
DRINKER BIDDLE & REATH, LLP
1500 K Street, N.W.
Washington, D.C. 20005
(202) 842-8800

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Can a party be precluded from bringing a claim, under a theory of "virtual representation," and thereby denied the due process right to a day in court, when the party had no legal relationship with any party to the previous litigation and did not receive notice of that litigation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. UNDER THE DUE PROCESS CLAUSE, A JUDGMENT BINDS ONLY PARTIES TO THE CASE AND DOES NOT PRECLUDE FUTURE LITIGATION BY A NONPARTY WHO HAD NO LEGAL OR CONSENSUAL REPESENTATION RELATIONSHIP WITH THE PARTIES AND EXERCISED NO CONTROL OVER THE CASE	7
A. A Judgment Binds Only Parties And Their Privies And Does Not Bind Non-Parties	7
B. Under Traditional Principles, Petitioner Was Not A Party Nor In Privity With A Party In The Prior Litigation	13
C. Preclusion Based on "Virtual Representation" Would Violate the Due Process Clause	18
D. At The Very Least, A Nonparty Who Was Denied The Opportunity To Participate In A Prior Case Cannot Be Bound To The Judgment In That Case	26

TABLE OF CONTENTS—Continued

Page

II. ALTERNATIVELY, THE COURT COULD DECIDE THAT THE NON-CONSTITUTIONAL FEDERAL LAW OF RES JUDICATA SHOULD NOT BE EXPANDED TO PERMIT PRECLUSION OF PETITIONER 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — Page

Arizona v. California, 460 U.S. 605 (1983) .. 15
Baker v. Baker, Eccles, & Co., 242 U.S. 394 (1917) 8, 13
Baker v. General Motors Corp., 522 U.S. 222 (1998) 7
Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912) 14
Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313 (1971) .. 7, 27
Burnham v. Superior Court, 495 U.S. 604 (1990) 8
Canal Bank v. Partee, 99 U.S. (9 Otto) 325 (1878) 24
Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) 19
Eddy v. Waffle House, 482 F.3d 674 (4th Cir. 2007) 9, 26-27
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 5, 19, 27
Faretta v. California, 422 U.S. 806 (1975) .. 10
Gonzalez v. Banco Central, 27 F.3d 751 (1st Cir. 1994) 26
Grannis v. Ordean, 234 U.S. 385 (1914) 13
Gratiot County State Bank v. Johnson, 249 U.S. 246 (1919) 9
Hansberry v. Lee, 311 U.S. 32 (1940) 7
Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) 6, 23
Jone Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 12
Jones v. Flowers, 547 U.S. 220 (2006) 16
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 10

TABLE OF AUTHORITIES—Continued

Page

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 10
Martin v. Wilks, 490 U.S. 755 (1989) 6, 7, 9, 10
Mason v. Eldred, 73 U.S. (6 Wall.) 231 (1868) 7
Montana v. United States, 440 U.S. 147 (1979) 17
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 10, 13, 16
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 7
Pennoyer v. Neff, 95 U.S. 714 (1877) 8
Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 10, 20
Postal Telegraph Co. v. City of Newport, 247 U.S. 474 (1918) 8, 15
Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1873) 19
Richards v. Jefferson County, 517 U.S. 793 (1996) 8, 13, 15, 18, 20
Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260 (1961) 17
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) 9
Strickland v. Washington, 466 U.S. 668 (1984) 11, 23
Taylor v. Blakey, 440 F.3d 965 (D.C. Cir. 2007) .....*passim*
Tice v. American Airlines, Inc., 162 F.3d 966 (7th Cir. 1998) 21
Tyus v. Schoemehl, 93 F.3d 449 (1996) 21, 26
United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) 11, 12

TABLE OF AUTHORITIES—Continued

	Page
Van Dusen v. Barrack, 376 U.S. 612 (1964)...	9-10
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).....	7, 17
RULES	
Fed. R. Civ. Pro. 19.....	10
Fed. R. Civ. Pro. 20.....	10
Fed. R. Civ. Pro. 23.....	20-21
Fed. R. Civ. Pro. 24.....	10
OTHER AUTHORITIES	
Restatement (Second) of Judgments § 41 (1980).....	15, 16
Restatement (Second) of Judgments § 60 (1980).....	24
Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim*, 68 Tul. L. Rev. 1303 (1994).....	16

IN THE

Supreme Court of the United States

No. 07-371

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR LAVONNA EDDY AND KATHY LANDER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici are the petitioners in *Eddy v. Waffle House*, No. 07-495, which is currently pending before this Court.[1] In *Eddy*, amici and others brought an action against a restaurant chain, alleging that they had

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

been denied service on account of their race when they sought to eat a meal at one of the chain's facilities. Before trial, the restaurant chain sought and obtained summary judgment against all plaintiffs but one, Mark Lander, who is the husband of amicus Kathy Lander. Mark Lander's claim was tried to a jury, but the jury found against him and judgment was entered in accordance with that verdict. The court of appeals held that summary judgment was mistakenly granted against amici. The court nonetheless refused to permit amici to return to the district court for further proceedings on the merits of their claim. The court held that, even though amici were not parties to the trial or resolution of the merits of their claims, they were collaterally estopped by the jury verdict and judgment against Mark Lander from further litigating those claims.

The court of appeals in *Eddy* thus agreed with the court of appeals in this case that a nonparty may be bound by a judgment, even in the absence of a representative legal relation with a party to that judgment or actual control of the litigation that resulted in that judgment. Indeed, the court of appeals in *Eddy* held that amici were bound to the judgment reached in their absence, notwithstanding that the district court had mistakenly refused to permit them to be parties to the trial and to submit their claims to the jury. Amici thus have an interest in the question presented in this case whether a broad "virtual representation" preclusion theory that permits preclusion of nonparties in those and similar circumstances is valid.

SUMMARY OF ARGUMENT

A. A long and unbroken line of cases from this Court has regularly reaffirmed the principle that, because each person's right to an opportunity to be heard is at the core of due process, a judgment in a case binds only those who have had such an opportunity—*i.e.*, the parties and the limited category of those in privity with them. The distinguished historical pedigree and consistent recognition of that principle is alone sufficient to establish that, as a matter of due process, someone who has not had an opportunity to be heard cannot be bound.

Other considerations lend further support (if such were needed) to that conclusion. To bind a nonparty to a judgment is equivalent to requiring compulsory intervention by nonparties to protect their rights, contrary to the longstanding recognition that plaintiffs have the privilege to choose if, when, and whether to assert their rights, within applicable procedural requirements. Binding a nonparty on the ground that someone else has adequately litigated a similar claim deprives the nonparty of the chance to make his own litigation choices, and it thus contradicts the interest in personal autonomy that underlies due process. Attempting to determine after the fact whether a nonparty outside the accepted categories of privity was "adequately represented" in a prior proceeding—a necessary condition for binding a nonparty under any view—requires a court to make an exceptionally difficult and ultimately indeterminate judgment; it thus increases the risk of inconsistent results on similar facts and erroneous results when nonparties with meritorious claims are precluded from litigating them. Finally, the key interest in the appearance of justice, and the ability

of litigants and society as a whole to have confidence in the judicial process, is threatened if litigants are given no opportunity to be heard before their claims are denied.

B. There is a limited category of nonparties—those who are in "privity" with a party—who are generally bound by a judgment. The accepted categories of nonparties who may be bound, however, is limited either to those who had legal or consensual representation relationships with a party or those who exercised actual control over the litigation notwithstanding their technical nonparty status. In either case, the nonparty did in fact have an opportunity to be heard, albeit through the nonparty's duly constituted representative or through the party whose conduct was controlled by the nonparty. Moreover, the rule of necessity supports binding the nonparty in those situations, because a failure to do so would ordinarily render resolution of certain disputes impossible or deprive the litigants and society of the enormous benefits of effective representation relationships.

C. Cases in which a nonparty is precluded based on the court of appeals' "virtual representation" theory have none of the features of accepted privity categories that render them acceptable under due process standards. In "virtual representation" cases as understood by the court of appeals, the nonparty has had no opportunity to be heard in the prior litigation, either *in propria persona* or through an authorized representative. The nonparty has had no control over the prior litigation. And no necessity requires substituting highly attenuated, after-the fact notions of "virtual representation" for the actual due process required by the Constitution. Although

the court of appeals' theory is based on the proposition that "adequate representation" is sufficient to substitute for an actual opportunity to be heard, the concept of "adequate representation" as "the touchstone of due process . . . has little to commend it." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). The poorly defined factors ("adequate representation," "close relationship") the court of appeals used in deciding whether petitioner was "virtually represented" in the prior litigation merely underscore the indeterminacy of its analysis and provide no assurance that the nonparty's right to a day in court received any protection in the prior proceeding.

D. At the very least, due process does not permit a nonparty who had no *possibility* of appearing in the prior litigation to be bound by its judgment. In this case, petitioner was not shown to have known of the existence of the prior litigation while it was ongoing, and he accordingly could not have participated in it. If the opportunity to be heard means anything, it means that a person must have had a chance, at some time and in some way, to be heard before his case is decided against him.

II. For the reasons given above, precluding petitioner under the court of appeals' "virtual representation" theory would deprive him of due process, and the Court should so hold. If there is doubt about that result, however, the Court could also decide this case on nonconstitutional grounds. Petitioner has presented a federal claim, which is governed by the federal law of res judicata. At the very least, the due process questions raised by the court of appeals' judgment are serious and substantial. Accordingly, rather than deciding the due process limits of

preclusion in this case, the Court could resolve this case simply by refusing to expand the federal law of res judicata to permit preclusion of a nonparty who had no legal or consensual representation relationship with a party and who did not exercise actual control over a party's litigation. That result would be dictated not only by the doctrine of constitutional avoidance, but also by the substantial defects in the court of appeals' "virtual representation" theory and the costs that the court of appeals' theory would impose on the judicial system and on individuals seeking to vindicate their legal rights.

ARGUMENT

It is a part of our "deep-rooted historic tradition" that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989). Petitioner was not a party to the proceedings in *Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002), the prior case relied on by the court of appeals to preclude petitioner's claim in this case. Indeed, on the present record, he did not even know of those proceedings. No one in *Herrick* was legally (or actually) required to protect his interests or represent him. There is no evidence that he had the legal right to, or actually did, exercise any control over the *Herrick* litigation. He was thus a "stranger[] to the proceedings" in *Herrick*, and, under long-settled principles of due process and res judicata, he cannot be bound by the judgment in that case. The "virtual representation" theory, as well as the court of appeals' indeterminate multi-factor test for applying it, fundamentally departs from those sound principles and should be rejected.

I. UNDER THE DUE PROCESS CLAUSE, A JUDGMENT BINDS ONLY PARTIES TO THE CASE AND DOES NOT PRECLUDE FUTURE LITIGATION BY A NONPARTY WHO HAD NO LEGAL OR CONSENSUAL REPRESENTATION RELATIONSHIP WITH THE PARTIES AND EXERCISED NO CONTROL OVER THE CASE

A. A Judgment Binds Only Parties And Their Privies And Does Not Bind Non-Parties

1. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); accord *Baker v. General Motors Corp.*, 522 U.S. 222, 237 n.11 (1998); Martin, 490 U.S. at 761; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). That rule is fundamental to our system of justice. "The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded." *Mason v. Eldred*, 73 U.S. (6 Wall.) 231, 239 (1868).

2. A system of justice could no doubt be imagined in which any given dispute or contested issue, if adequately litigated by a party in one case, would be determined once and for all and could never be litigated again by anyone else. But such a system would be profoundly at odds with root principles of

due process under our system of law. This Court has long recognized that "[t]o hold one bound by the judgment who has not had [an opportunity to be heard] is contrary to the first principles of justice." *Baker v. Baker, Eccles, & Co.*, 242 U.S. 394, 403 (1917); see *Richards*, 517 U.S. at 797 n.4 ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."). Just as a court

> may not, consistently with the [Due Process Clause], enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

Postal Telegraph Co. v. City of Newport, 247 U.S. 474, 476 (1918) (citations omitted).

3. That consistent historical understanding of due process is sufficient to establish that one who as a nonparty had no opportunity to be heard cannot be bound by a judgment. Cf. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (due process "mean[s] a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights"); *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990) (plurality opinion). Moreover, the due process insistence on each person's own right to be heard in this context itself serves a number of vital interests.

Mandatory intervention. To bind a nonparty to a judgment is equivalent to requiring that the non-

party intervene in the prior action if the nonparty wants to be heard. In many cases, such as the present one, it may have been impossible for the nonparty to intervene or participate as a party in the prior case because of lack of knowledge or for other reasons. See 490 F.3d at 974 (holding that evidence did not show that petitioner even knew of the *Herrick* litigation while it was ongoing); *Eddy v. Waffle House*, 482 F.3d 674, 678-680 (4th Cir. 2007) (finding that persons against whom summary judgment was mistakenly granted are nonetheless bound by the judgment reached after a trial involving others in their absence), pet. for cert. pending, No. 07-495. In such cases, binding the nonparty to the judgment is simply equivalent to denying the nonparty the due process right to be heard.

Even in cases in which the nonparty could have intervened, however,

> [t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Martin, 490 U.S. at 763 (quoting *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934)); see *Gratiot County State Bank v. Johnson*, 249 U.S. 246, 249-250 (1919). Requiring intervention by nonparties would deprive nonparty plaintiffs of their time-honored and legislatively protected rights to choose, within the limits of established legal requirements, the time and venue of litigation. See *e.g.*, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 536 (1967); *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). It

would also be inconsistent with rules governing intervention, which authorize parties to join non-parties in some circumstances see, Fed. R. Civ. Pro. 19, 20, but do not require intervention, see Fed. R. Civ. Pro. 24. See generally *Martin*, 490 U.S. at 765 ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.").

Personal autonomy. Equally important, the Due Process Clause protects the right of individuals to make their own choices regarding their legal claims, as they can with respect to their other property interests, regardless of whether those choices would be seen by others—or would actually be—the best means of protecting their own interests. See, *e.g.*, *Faretta v. California*, 422 U.S. 806, 834 (1975) (right of self-representation in criminal proceedings). The "central concerns of procedural due process" include not only "the prevention of unjustified or mistaken deprivations," but also "the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This Court has recognized that a chose in action is a form of property interest. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950). It is consistent with that recognition that the owner of the property interest—not some other individual with a similar or even identical interest—have the basic right to determine how and when to assert it.

Risk of error. Precluding nonparties also puts at risk the basic interest in ensuring accuracy in the resolution of legal disputes. If a person is unsuccessful in litigating his own claim, the fault may be attributable to a weak claim, less-than-optimal choices about how to litigate it, or some combination of the two. No court need undertake the difficult inquiry into which was the actual cause of the failure, because our adversary system achieves accuracy by relying on the parties to make their own litigation choices, and it therefore holds them to the consequences of their decisions. But precluding a *nonparty* based on *someone else's* unsuccessful litigation of a similar claim is either arbitrary and mistaken (if the prior party has lost the claim because it was inadequately litigated) or requires a detailed inquiry into the adequacy of the prior litigation. This Court has described such after-the-fact judgments about which of several litigation choices would have produced the most favorable result as "unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).[2] Moreover, given a court's own built-in inter-

---

[2] The question whether a party to a case pursued the best means of litigating a claim introduces far more subjectivity and indeterminacy than the inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984), in cases involving effective assistance of counsel under the Sixth Amendment. The standard under *Strickland* is "reasonableness under prevailing professional norms." *Id.* at 688. That standard takes into account that "there are countless ways to provide effective assistance in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689. When the question is not whether a party had effective assistance, but whether a party's litigation of a case was so favorable to a nonparty's interests that it substitutes for the

est in clearing its own dockets, it may be particularly difficult for a court to make a suitably disinterested judgment when inquiring into the adequacy of a prior party's litigation of a claim now being advanced by a nonparty to the earlier litigation.

Appearance of justice. Finally, a key function of due process is to provide procedures that are and that appear to be fair, thus ensuring confidence in the judicial system and its resolution of disputes. As Justice Frankfurter explained in an oft-quoted passage:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Jone Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring). If a person with a claim has had the opportunity to be heard in court and to obtain a judicial resolution of the merits of the claim, that person, and

---

nonparty's right to be heard on a similar claim, the inquiry would have to be much more exacting. While counsel's choice of one of "countless" effective litigation strategies is sufficient to satisfy *Strickland*, a nonparty's choice of one of many reasonable ways to litigate a case is therefore not sufficient to protect a nonparty's due process rights. Instead, the due process inquiry, if undertaken at all, would have to be much more like the "unquantifiable and indeterminate" inquiry rejected by the Court when a party is denied counsel of choice, see *Gonzalez-Lopez*, 126 S. Ct. at 2564, in which the question would be whether the case was in fact litigated in the way most likely to achieve a sound result.

society at large, should be able to accept the result as fair, even if disappointing. But depriving the claimant of an opportunity to be heard on the ground that someone else, over whom the claimant had no control, had litigated a similar claim would more likely result in bitterness and a sense of injustice on the part of the claimant, as well as a decline in public regard for the fairness of the judicial system.

4. For all of those reasons, "[t]he fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." *Baker*, 242 U.S. at 394; see *Richards*, 517 U.S. at 798; *Mullane*, 339 U.S. at 314; *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Because a party to a proceeding has such an opportunity, a party may be bound by the court's resolution of the party's claim.

B. Under Traditional Principles, Petitioner Was Not A Party Nor In Privity With A Party In The Prior Litigation

Petitioner was not a party to Herrick's case, and because he had not been shown to have notice, he had no opportunity to be a party to Herrick's case.[3] It has

---

[3] Although the district court concluded that petitioner "apparently had notice of Herrick's litigation," the court of appeals correctly held that the facts the district court relied upon "do not show that [petitioner] had notice of Herrick's lawsuit while it was ongoing." 490 F.3d at 974. In reaching its conclusion that petitioner knew of Herrick's litigation, the district court relied on the "shared interest [between petitioner and Herrick] in antique aircraft, their common membership in [an antique aircraft association], their use of the same lawyer for their respective cases, Herrick's sharing with [petitioner] the information he obtained through discovery, and his request that [petitioner] assist in the restoration of his F-45." 490 F.3d at 974. Many of of those facts—petitioner's use of Herrick's lawyer, Herrick's

long been settled, however, that a limited category of nonparties—often referred to as those "in privity with" a party—may be bound by a judgment. In particular, nonparties who have relationships of legal responsibility or of actual control with someone who is a party to a prior proceeding have commonly been found to be in privity with that party, such that the nonparty may be bound by a judgment against the party. The characteristics that define those privity relationships—legal responsibility of one individual for another, actual control by one individual over the other's litigation, and, frequently, the rule of necessity—provide satisfactory substitutes for the nonparty's lack of direct opportunity to be heard. Precluding the nonparty in such a relationship based on a prior judgment against the party therefore satisfies due process. None of those characteristics, however, are present in the relationship between petitioner and Herrick. Accordingly, precluding petitioner because of Herrick's prior litigation violates due process.

a. *Legal responsibility*. At one time, two persons were held to be in privity only if they had a successive interest in the same property. See, *e.g.*, *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 128-129 (1912) ("privity denotes mutual or successive relationship to the same right of property"). That rule thus prevented a grantee of

---

sharing of information, and Herrick's request for petitioner's assistance—apparently postdated Herrick's litigation. Especially in light of that discrepancy, the facts relied on by the district court surely do not support any inference of petitioner's knowledge. In any event, there is no reason for this Court to revisit the court of appeals' factbound conclusion that it had not been shown that petitioner knew of Herrick's litigation.

property, for example, from relitigating an issue regarding rights in the property already litigated by the grantor. As this Court explained, "[t]he ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes cum onere." *Postal Telegraph*, 247 U.S. at 474-475. Because the successive owner has never acquired the contested right in property, the successive owner is deprived of no property interest if not permitted to litigate that right, and there can be no due process violation.

As this Court observed in *Richards*, however, "although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." 517 U.S. at 798. "For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust." *Ibid.*; see *Arizona v. California*, 460 U.S. 605, 626-627 (1983) ("As a fiduciary, the United States had full authority to bring [a previous case] for the Indians and bind them in the litigation."). More generally, "[a] person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party." Restatement (Second) of Judgments § 41(1) (1980). That rule applies not only to a ward or beneficiary, but also in other cases in which one person acts after having been invested by law or consent with authority to represent another. *Ibid.*

Investing legal representatives with the authority to bind those whom they represent within the scope of the representation generally poses no due process problem. In cases involving a representative vested by law or consent with authority to litigate on behalf of another, the represented nonparty *has* had a due process opportunity to be heard and participate in the litigation, albeit through the representative. Moreover, although the representative's actions may preclude the represented person in a future action, "the represented person may have an action against the representative for breach of his duty to conduct the relationship in a faithful, diligent, and prudent way." Restatement, *supra*, § 41 cmt. a. The combination of a represented party's actual participation in the lawsuit through a legally or consensually appointed representative and the residual cause of action against a faithless representative generally provides adequate due process protection for the represented person's property interests.

The rule of necessity also supports holding a represented person bound by litigation undertaken on his behalf by his representative. The rule of necessity is a significant factor in due process analysis. See, *e.g.*, *Mullane*, 339 U.S. at 313-314 ("A construction of the Due Process Clause which would place impossible or impractical obstacles in the way [of a State's vital interests] could not be justified."); see *Jones v. Flowers*, 547 U.S. 220, 234 (2006). In some cases in which a nonparty is bound by the actions taken by his representative, the nonparty's identity or existence could not have been known at the time of the original action. See Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim*, 68 Tul. L. Rev. 1303, 1310 n. 40 (1994) (citing cases).

In other cases, refusing to recognize a person as representing another would deprive the representation relationship of its many benefits for the parties concerned and for society as a whole. In both circumstances, the rule of necessity supports binding a represented party to the actions taken by a legally or consensually appointed representative.

b. *Actual Control.* Even in cases in which a party is not legally required to represent a nonparty, this Court has held that nonparties may be precluded "when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Montana v. United States*, 440 U.S. 147, 154 (1979); accord *Zenith Radio* Corp., 395 U.S. at 111; *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 n.4 (1961). Precluding a nonparty in those circumstances raises little due process problem, for reasons similar to those in the cases involving a representation relationship. A person who actually controls litigation has had the opportunity to be heard and to have his claim decided. Having thus had his day in court by those means, there is no due process objection to precluding him from further litigation of the same claim or the same issues.

c. The key features of the categories of privity described above are not present in this case. In the prior litigation, Herrick had no responsibility, imposed either by law or by consent, to represent petitioner. To the contrary, Herrick was free to conduct the litigation as he wished, with no regard for petitioner's interests or wishes. Similarly, there is no evidence that petitioner, who may well not have known of Herrick's case, exercised any control over Herrick's litigation (or, for that matter, that Herrick

exercised any control over this case). Nor does the rule of necessity provide any support for binding a nonparty to the result in *Herrick*; neither Herrick's claim nor petitioner's would have been impossible to bring or otherwise impractical if, under the ordinary rule, the judgment in *Herrick* is applied only against the parties to that case itself. Accordingly, apart from the court of appeals' "virtual representation" theory, there is no basis for finding that petitioner was in privity with Herrick. The traditional due process justifications for precluding a nonparty based on privity—a relationship of legal or consensual representation or actual control, and the rule of necessity—have no application here.

C. Preclusion Based on "Virtual Representation" Would Violate the Due Process Clause

Petitioner and Herrick, though personally acquainted, had no legal obligation to or control over each other and "are best described as mere 'strangers' to one another." *Richards*, 517 U.S. at 802. Petitioner thus did not have his day in court in the prior litigation in *Herrick*. The court of appeals' "virtual representation" theory, which would bind petitioner to the judgment in *Herrick*, denies him due process, and it should be rejected.

1. Under the "virtual representation" theory adopted by the court of appeals, "some cases of successive litigation involve as a litigant 'a nonparty [to the original action] whose interests were adequately represented by a party to the original action.'" 490 F.3d at 970. The court concluded that "[i]n those cases the party to the prior litigation is treated as the proxy of the nonparty, with the result

that the nonparty is barred from raising the same claim." *Ibid.*

Although the court of appeals characterized its "virtual representation" theory as "not controversial," in fact the theory is mistaken even at that "level of generality." 490 F.3d at 370. The proposition that "adequate representation . . . is the touchstone of due process . . . has little to commend it." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Due process does not merely guarantee that a person will be "adequately represented"; it entitles a person to have an opportunity to be heard before that person's own claim is decided. The fact that *someone else* has been heard or that *someone else's* similar or even identical claim has been adequately litigated may provide some basis to predict the outcome of later litigation on a particular claim (though genuine factual disputes may easily be decided differently by different decisionmakers, even if they are litigated identically). Due process, however, has never permitted dispensing with an individual's right to be heard on the ground that the court can predict that the claim would be a losing one—even if the prediction could (as is not true in this case) be made with great confidence. See *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915) ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits."); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 123 (1873) ("Whether, in fact, the individual . . . is without defense . . . is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."). Each

person with a claim has a right to be heard, and the court's decision on the merits of the person's claim must come only after that person—not someone else—has had the chance to exercise the right.

To be sure, this Court has recognized that preclusion may apply "in certain limited circumstances" in which "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Richards*, 517 U.S. at 798 (quoting *Hansberry*, 311 U.S. at 41-42). That recognition, however, does not support the court of appeals' theory. The Court's reference to "certain limited circumstances" in *Richards* and in *Hansberry* was not to cases, such as this one, in which there was an after-the-fact determination that a person's interests had been "adequately represented" because someone else had brought the same claim and lost. Rather, the Court's reference was to the well-developed law of class actions. Binding absent class members may raise significant due process issues, regardless of how well the named class members may have litigated the case. See, *e.g.*, *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). At bottom, however, a valid class action rests on the same foundations as the categories of privity discussed above. By operation of law, and, frequently, with consent, see *id.* at 811-812 (right to opt out), the class representative has a legal obligation to represent the entire class. That obligation is zealously protected by numerous procedural safeguards as the litigation is proceeding. See *ibid.*; Fed. R. Civ. Pro. 23. And the rule of necessity further supports the class action mechanism, since individual litigation of many or most class claims would be impossible or futile. Cf. Fed. R. Civ. Pro. 23(a) (prerequisite to class action that "the class is so numerous that joinder of all

members is impracticable), 23(b). Given those features, it is reasonable to conclude that absent class members have had their day in court through their representative, just as in other cases of privity.

This case, however, lacks all of those features. No law or rule vested Herrick with authority to litigate on behalf of petitioner in the prior litigation, and petitioner never consented to being represented by Herrick. No special procedures or judicial determinations ensured that Herrick would litigate petitioner's claim, as well as his own. There is no serious obstacle, much less an impossibility, to Herrick and petitioner each litigating their own claims. The bases recognized by this Court in *Richards* and *Hansberry* for finding that due process permits absent class members to be bound by a judgment are entirely absent in this case. Cf. *Tice v. American Airlines, Inc.*, 162 F.3d 966, 972 (7th Cir. 1998) ("[T]he fact that virtual representation looks like a class action but avoids compliance with Rule 23 is a weakness, not a strength, of the doctrine.").

2. The particular multi-factor "virtual representation" inquiry applied by the court of appeals, like the similarly indeterminate inquiries adopted by other courts that have adopted a similar theory, see, *e.g.*, *Tyus v. Schoemehl*, 93 F.3d 449 (1996), demonstrates the conflict with core due process principles. In the court of appeals' view, a nonparty may be precluded by "virtual representation" if a party to the prior case and the nonparty had an "identity of interests" and "adequate representation," and if either (a) there is "a close relationship between the present party and his putative representative," (b) there was "substantial participation by the present party in the first case," or (c) there was "tactical

maneuvering on the part of the present party to avoid preclusion by the prior judgment." 490 F.3d at 972. Yet those factors, individually or as a group, do not establish that the nonparty has had his own day in court. Accordingly, the presence of those factors is insufficient to preclude a nonparty from litigating his claim.

The court of appeals explicated the "identity of interests" factor to include the requirement that the party to the earlier case had "substantially the same incentive" to achieve the desired result as the nonparty. 490 F.3d at 972. The fact that two individuals have the same incentive. however strong, to press a claim establishes only that they both *may* choose to litigate the claim soundly and they *may* choose to litigate it in the same way. Their similarly strong incentive is also entirely consistent with each of them choosing different alternatives from among the perhaps numerous sound ways to litigate their claims. It is also consistent with the regrettable failure of one of them, though possessing a strong incentive, to pursue the litigation of the claim in a reasonably effective way. Accordingly, precluding a nonparty based on an "identity of interests" with a party may easily lead to denying the opportunity to be heard to a nonparty who had a perfectly sound and likely successful claim, and who attempted to vindicate that claim in accord with all applicable procedural requirements. The "identity of interests" factor provides no protection for the nonparty's due process rights.

The court of appeals explicated the factor of "adequate representation" as largely overlapping the "identity of interests" factor, relying in large part on Herrick's "incentive to litigate zealously" to find that

petitioner was "adequately represented" by Herrick. 490 F.3d at 974.[4] The only additional fact the court added to the "adequate representation" calculus was the fact that "Herrick and [petitioner] used the same attorney to pursue their FOIA claims." *Ibid.* But that additional fact adds nothing. Although use of the same attorney who had litigated an earlier case could, as the court of appeals stated, represent "satisfaction with the attorney's performance in the prior case," *id.* at 975, a person may retain an attorney with experience in litigating a particular type of claim for a wide variety of reasons, such as a desire to save money on attorney preparation, a lack of legal sophistication or ability to gauge the attorney's past performance, or even an attorney's promise to litigate a new case differently than a prior one. Indeed, given that the unfavorable result in *Herrick* appears to have turned on Herrick's failure to challenge important issues on appeal, see *Herrick*, 298 F.3d at 1194, it is very unlikely that petitioner retained Herrick's attorney out of *satisfaction* with his prior performance, or out of a desire that the attorney retroactively be recognized as his repre-

---

[4] It is telling that the court of appeals found that the fact that the nonparty "might have changed the strategy or tactics of counsel in the first case . . . does not necessarily demonstrate the representation was inadequate." 490 F.3d at 974 n. *. As support, the court of appeals cited this Court's statement in *Strickland v. Washington*, 466 U.S. 668, 688-690 (1984). As explained above, see n. 2, *supra*, the *Strickland* standard, while adequately protective of a defendant's right to effective assistance of counsel, is far too relaxed to protect a person's right to the opportunity to be heard. Indeed, the court of appeals' reliance on *Strickland* underlines the impermissible presupposition of the virtual representation theory: that due process requires only that each *claim*, not each *person*, have the opportunity to be heard.

sentative in the prior case. Without such a retroactive appointment, however, petitioner remains entirely *un*represented—not "virtually represented"—in the prior case.

The only other factor the court found present was that of a "close relationship" between Herrick and petitioner. The record in this case does not permit further explication of the precise nature and incidents of that relationship and whether it satisfied the court of appeals' own requirement that "a close association for res judicata purposes is a relationship like that between family members or business partners." 490 F.3d at 975. The law may indeed clothe business partners in specific and limited circumstances with the legal authority to bind the partnership and, thus, each other. See Restatement (Second) of Judgments § 60 (1980). But that effect occurs only *after* the partners have made a free choice to enter into the partnership relationship, with all of its legal incidents. Here, petitioner *never* entered into a legal relationship with Herrick that clothed Herrick with authority to bind petitioner. As for family members, since the welcome demise of the era when married women could not make their own enforceable contracts, see *Canal Bank v. Partee*, 99 U.S. (9 Otto) 325, 331 (1878), competent adult family members ordinarily do *not* have the right to incur obligations or make binding commitments on behalf of each other, unless specific consent has been given to do so. More generally, one person's decision to associate with another—even to form a "close association"—does not lessen in any way the due process rights that each possesses in a judicial proceeding.[5]

---

[5] In concluding there was a "close association" between petitioner and Herrick, the court of appeals relied not only on

The court of appeals did not suggest that either of its other two factors was present in this case. But those factors in any event would provide no support for binding a nonparty to a judgment in a prior case. One of the court of appeals' factors is "substantial participation by the present party in the first case." 490 F.3d at 972. Insofar as "substantial participation" means participation as a party or actual control of the prior litigation, it is indeed sufficient to satisfy due process under settled principles. See pp. __-__, *supra*. But participation by a nonparty in some other way—as a witness, a spectator, a sympathetic friend of a litigant, an interested bystander, etc.—carries with it no right to be heard or to obtain judicial resolution of the validity of the nonparty's own claim. Accordingly, regardless of whether it is combined with other factors or present alone, such nonparty participation does not substitute for the nonparty's due process right to present his own claim in the future.

The court of appeals' other factor—"tactical maneuvering," 490 F.3d at 972—has at times been referred

---

the bare characterization of "close association," but also on the facts that "Herrick asked [petitioner] to assist him in restoring his F-45 [and] provided information to [petitioner] that Herrick had obtained through discovery." 490 F.3d at 975. Neither fact is of consequence. Even individuals engaged in a common enterprise may have distinct legal rights to press and distinct ideas about how, whether, and when to do so. And Herrick's decision, presumably *after* his own case was completed, to share information with petitioner in no way suggests that, while Herrick's litigation was ongoing, Herrick had any basis in law or consent to represent petitioner. In short, neither fact could provide any support to the only conclusion that matter s for due process purposes: that petitioner somehow had his own day in court in the course of the *Herrick* case.

to as supporting a finding of privity. See, *e.g.*, *Gonzalez v. Banco Central*, 27 F.3d 751, 761 (1st Cir. 1994); *Tyus*, 93 F.3d at 457. There may well be particular instances in which the "tactical maneuvering" engaged in by a nonparty demonstrates either actual control by the nonparty over the prior case or the nonparty's consent to be represented by the party in the prior case. "Tactical maneuvering" that consists simply in a nonparty's exercise of his right not to intervene in a case does not provide any basis to bind a nonparty to the judgment in that case.

D. At The Very Least, A Nonparty Who Was Denied The Opportunity To Participate In A Prior Case Cannot Be Bound To The Judgment In That Case

For the reasons given above, the Due Process Clause does not permit binding a nonparty to a judgment, where no party to the case had a legal or consensual obligation to represent the interests of the nonparty and where the nonparty did not exercise actual control over the case. This case, however, presents an extreme example of a case in which the nonparty cannot be bound. Even if a nonparty who could have, but did not, participate in a prior case could somehow be bound by the judgment, it surely is the case that a nonparty like petitioner, who had no knowledge of the prior case and thus no possibility of participating in it, could not be bound by its outcome. If the opportunity to be heard means anything, it means that an individual must have had a chance, at some time and in some way, to be heard before his case is decided against him.[6]

---

[6] Even more extreme is *Eddy v. Waffle House*, 482 F.3d at 678, in which amici were *precluded* from participating in a trial

II. ALTERNATIVELY, THE COURT COULD DECIDE THAT THE NONCONSTITUTIONAL FEDERAL LAW OF RES JUDICATA SHOULD NOT BE EXPANDED TO PERMIT PRECLUSION OF PETITIONER

The due process issue is squarely presented by this case. As discussed above, the analysis is clear, and the court of appeals' holding so far departs from settled principles of due process that this Court should reverse on the ground that binding petitioner to the judgment in the prior litigation would violate the Due Process Clause. Indeed, the Court has long recognized the close connection between the Due Process Clause and the law of res judicata, see *Eisen*, 417 U.S. at 173-174, 176-177, and the merits of this case warrant resolving it on due process grounds.

If the Court has any doubt about that result, however, the Court could also decide the case on nonconstitutional grounds. Because petitioner's FOIA claim was brought under federal law, it is governed by federal principles of res judicata. *Blonder-Tongue*, 402 U.S. at 325 n.12. If there is any doubt about the constitutionality of binding petitioner to the judgment in *Herrick*, the court of appeals should nonetheless hold that the *non*constitutional federal law of res judicata should not be expanded to permit binding a nonparty in the circumstances present here.

1. If the Court believes that the due process question in this case is not entirely clear, principles

---

by a mistaken grant of summary judgment and then held to be nonetheless bound to the judgment reached in their absence. See pp. __-__, *infra*.

of constitutional avoidance would nonetheless require reversal of the court of appeals' decision, albeit on nonconstitutional grounds. For the reasons given above, the court of appeals' ruling, and the "virtual representation" theory underlying it, at the very least raises serious due process questions. Such questions could be avoided by rejecting the expansion of the federal common law of res judicata law that would be required by the court of appeals' decision. That would permit Congress and the States, subject to any later due process challenge in court, to determine whether and in what particular circumstances such expansion would be desirable. Accordingly, the canon of constitutional avoidance dictates that, if this Court does not resolve this case on constitutional grounds, it should hold that, as a matter of the federal common law of res judicata, a nonparty is not bound by a judgment if the nonparty did not have a legal or consensual representative relationship with a party and did not exercise actual control over the litigation that resulted in the judgment.

2. Moreover, even aside from the doctrine of constitutional avoidance, the court of appeals' "virtual representation" theory is unsound. It requires a court to apply an indeterminate, multifactor test to decide whether a nonparty can be bound to a judgment. See pp. 11-12, *supra*. The factors that comprise that test are either poorly defined ("close relationship," "substantial participation"), too reliant on incentives to litigate and insufficiently attentive to the actual conduct of the past litigation ("identity of interests" and "adequate representation"), or both. See pp. 21-26, *supra*. The indeterminacy of the test invites inconsistent results, and it opens the door for courts to penalize disfavored claims or claimants and to give undue weight to the courts' own interests in

clearing their dockets. See pp. 11-12, *supra*. Indeed, the very indeterminacy of the test threatens to create a regime in which individuals in effect are required to intervene in litigation to protect against being bound by a judgment, notwithstanding (a) the long-recognized privilege of a plaintiff to choose the venue and timing of a suit, (b) the rejection of a notion of compulsory intervention in federal law, and (c) the person's own preference to avoid litigation altogether and first seek some other resolution of a potential legal claim. See pp. 9-10, *supra*. The federal law of res judicata should not be expanded so broadly, in the face of those very considerable costs.

CONCLUSION

The judgement of the court of appeals should be reversed.

Respectfully submitted,

JAMES A. FELDMAN *
3750 Oliver Street, N.W.
Washington, D.C. 20015
(202) 686-6607

GERALD S. HARTMAN
MARY E. KOHART
DRINKER BIDDLE & REATH, LLP
1500 K Street, N.W.
Washington, D.C. 20005
(202) 842-8800

* Counsel of Record

February 27, 2008

AMICUS CURIAE BRIEF

84
54790a
7
21 pgs
No. 07-371
FILED
FEB 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL SECURITY ARCHIVE, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPENTHEGOVERNMENT.ORG, THE NATIONAL WHISTLEBLOWER CENTER, AND THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

MEREDITH FUCHS
General Counsel
THE NATIONAL SECURITY ARCHIVE
GEORGE WASHINGTON UNIVERSITY
Gelman Libra[illegible] Suite 701
2130 H Street, NW
Washington, DC 20037
202-994-7000

Attorney for Amici Curiae

February 27, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Freedom of Information Act creates – and depends for enforcement upon – an individual right for any member of the public to request, and pursue through litigation, access to government records	5
II. Litigation by one FOIA requester does not protect the individual or public interests of other FOIA requesters	8
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

EPA v. Mink, 410 U.S. 73 (1973) 5

FEC v. Akins, 524 U.S. 11 (1998) 6

Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) 15

NLRB v. Robbins Tire & Rubber, 437 U.S. 214 (1978) 5

Oglesby v. United States Dep't of Army, 920 F.2d 57 (D.C. Cir. 1990) 12

Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) 13

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) 5

Richards v. Jefferson County, Ala., 517 U.S. 793 (1996) 11, 16

Taylor v. Sturgell, 490 F.3d 965 (D.C. Cir. 2007) 15

Tyrus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) 11, 12

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 5, 7

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) 14

STATUTES

5 U.S.C. § 551(2) 5

5 U.S.C. § 552(a)(1) 8

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. § 552(a)(2)(D) 8

5 U.S.C. § 552(a)(3) 5, 7, 12

5 U.S.C. § 552(a)(4) 6, 12

5 U.S.C. § 552(a)(6)(E) 13

5 U.S.C. §§ 552(b)(6), (b)(7)(C) 12

OTHER AUTHORITIES

Agencies Continue E-FOIA Implementation, FOIA Post (Department of Justice, Washington, D.C.), Mar. 14, 2001 8

Amendment Implementation Guidance, FOIA Update (Department of Justice, Washington, D.C.) 1997, Vol. XVIII, No. 1 9

Congress Enacts FOIA Amendment, FOIA Update (Department of Justice, Washington, D.C.) 1996, Vol. XVII 9

Department of Justice, *Freedom of Information Act Guide* 29-30 (2007) 10

Exec. Order No. 12,958 (as amended by Exec. Order No. 13,292), 68 Fed. Reg. 15315 (Mar. 25, 2003) 13

National Security Archive, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent* (Mar. 12, 2007) 10

New Attorney General FOIA Memorandum Issued, FOIA Post (Department of Justice, Washington, D.C.), Oct. 15, 2001 13

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996) 7

H.R. Rep. No. 104-795 (1996) 7, 9

S. Rep. No. 89-813 (1965) 6

INTEREST OF *AMICI CURIAE*[1]

The Freedom of Information Act (FOIA) is the principle tool for members of the public to seek records from the government. *Amici Curiae* are all organizations that rely on the FOIA for their work and that support the openness of government operations. *Amici* are concerned that the decision below could adversely affect the ability of Freedom of Information Act requesters to seek judicial review of agency withholding, thereby hindering government transparency.

The National Security Archive (the "Archive") is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents, concerning United States foreign policy and national security matters, obtained through the Freedom of Information Act. As part of its mission to broaden access to the historical record of the U.S. government, the Archive is a leading user of the FOIA.

The Reporters Committee for Freedom of the Press ("the Reporters Committee") is a voluntary, unincorporated association of reporters and editors

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to its preparation or submission.

that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

OpenTheGovernment.org is a coalition of more than 65 consumer and good government groups, journalists, environmentalists, library groups, labor and others across the political spectrum united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

The National Whistleblower Center ("NWC") promotes public access to information and government accountability through research, public education and advocacy. NWC has provided support and advocacy on behalf of employee whistleblowers who have exposed abuse of civil liberties and civil rights by the Federal Bureau of Investigation.

The Electronic Frontier Foundation ("EFF") is a not-for-profit membership organization with offices in San Francisco, California and Washington, DC. EFF works to inform policymakers and the general public about civil liberties issues related to technology, and to act as a defender of those liberties. In support of its mission, EFF uses the Freedom of Information Act to obtain and disseminate information concerning the activities of federal agencies.

SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) provides a right for *any person* to make a FOIA request seeking federal agency records for *any purpose*. It also provides a private right of action for any complainant – a person who has been denied records requested under the law – to bring a lawsuit in federal court to enforce the FOIA. This private right of action is a crucial component of the law because the FOIA is enforced *solely* by individuals who bring lawsuits against federal agencies.

The broad availability of FOIA is also critical to the success of the law, which does not place any individual or group above another with regard to access to government records. Thus, FOIA is designed to accommodate multiple requests for the same records. For example, the statute includes a "frequently requested records" provision, which instructs agencies to make records that "have become or are likely to become the subject of subsequent requests for substantially the same records" available electronically to the public, but also requires agencies to continue to process additional FOIA requests for the same records. Indeed, many members of the public may be interested in the same records but for different reasons, each of which is legitimate under the law. Only by protecting individual rights under FOIA one request at a time is the core public purpose of FOIA fulfilled.

Against this background, the concept of virtual representation applied in a FOIA matter raises serious concerns. FOIA requests are filed by many different people for many different reasons. Historians, journalists, public interest advocates, individuals, and businesses do not have the same incentive to request records – even if they all are interested in release of the same records – and do not have any incentive to litigate in a way that protects the interests of others. Because a FOIA request depends on a series of deliberate actions by an individual, rather than a government action that generally affects the public, it is unlike the "public law" cases that some courts have described as more appropriate for a finding of virtual representation. No one lawsuit will achieve FOIA's public purpose (or, indeed, another requester's individual interest); the statute is designed to fulfill the public part of its purpose through many individuals each reminding federal agencies that they cannot operate in secret.

Finally, FOIA requesters have developed a professional community that exchanges information and ideas. Those relationships should not be imputed to create some sort of "special relationship" that is evidence of virtual representation.

ARGUMENT

I. The Freedom of Information Act creates – and depends for enforcement upon – an individual right for any member of the public to request, and pursue through litigation, access to government records.

In enacting the Freedom of Information Act ("FOIA"), Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974), and sought "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber*, 437 U.S. 214, 242 (1978). The FOIA creates "a judicially enforceable public right to secure [government records] from possibly unwilling hands." *EPA v. Mink*, 410 U.S. 73, 90 (1973).

To accomplish these purposes, FOIA confers a right on "any person" to request and obtain records held by the government, subject to published regulations regarding time, place, fees, and procedure. 5 U.S.C. § 552(a)(3); *cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("the identity of the requesting party has no bearing on the merits of his or her FOIA request"). The term "person" is defined in 5 U.S.C. § 551(2) to include individuals, partnerships, corporations, associations, or public or private organizations other than an agency.

There is no distinction in the statute between the "person" entitled to make a FOIA request and the "complainant" entitled to sue for judicial enforcement of that right under 5 U.S.C. § 552(a)(4)(B). Thus, FOIA creates a private right of action for the benefit of "any person" whose request for records has been denied by the government agency. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (recognizing inability to obtain information as an injury in fact). Indeed, this private right of action is a crucial component of the FOIA enforcement scheme because, unlike many other laws designed to grant rights to members of the public or to protect the public, there are no federal or state agencies that will independently enforce those rights and protections in the FOIA context; the statute is exclusively enforced through litigation by members of the public.

Further, FOIA permits requests to be made for any purpose. The passage of FOIA in 1966 was specifically intended to eliminate "the test of who shall have the right to different information." S. Rep. No. 89-813, at 40 (1965). The law does not permit the agency to consider the requester's need or intended use in determining whether to disclose the records. As long as the records do not fall within one of the statutory exemptions, an agency, "upon *any* request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, *shall* make the records promptly

available to any person." 5 U.S.C. § 552(a)(3) (emphasis added).

Courts have affirmed this basic principle of FOIA, noting that Congress "clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document." *Reporters Comm.*, 489 U.S. at 771 (internal quotation marks omitted); *see also* H.R. Rep. No. 104-795, at 6 (1996) ("Requesters do not have to show a need or reason for seeking information."), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3449.

Congress has repeatedly emphasized this intention. Thus, the 1996 amendments to the Freedom of Information Act include congressional findings that "the purpose of [FOIA is to] . . . establish and enable enforcement of the right of any person to obtain access to the records of [agencies of the Federal Government], subject to statutory exemptions, *for any public or private purpose*." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (emphasis added). The restriction against federal agencies considering the purpose of the request makes particular sense in the context of FOIA, where the underlying principal of the law is that the government agencies act as custodians of public records that over time, and as sensitivities recede, will be made available to the public.

Thus, FOIA provides each and every person who is interested in government records, separately, the

right to request the information and pursue the matter in court if the requested records are withheld.

II. Litigation by one FOIA requester does not protect the individual or public interests of other FOIA requesters.

Congress enacted the FOIA with a full understanding that there would be instances when multiple FOIA requesters were interested in the same or similar records. In addition to requiring affirmative publication in the Federal Register and electronically of several categories of information that are of wide interest to the public, 5 U.S.C. § 552(a)(1), the law requires that agencies make available electronically those records that the agency determines "have become or are likely to become the subject of subsequent requests for substantially the same records," 5 U.S.C. § 552(a)(2)(D). These are now commonly referred to as "frequently requested records."[2] As the Department of Justice's guidance has noted, this electronic availability requirement applies when there are multiple FOIA requests for the same records.

Importantly, even if frequently requested records are posted in electronic reading rooms, Congress still anticipated the likelihood that there could be additional requests for the same records and indicated

---

[2] *See Agencies Continue E-FOIA Implementation*, FOIA Post (Department of Justice, Washington, D.C.), Mar. 14, 2001, http://www.usdoj.gov/oip/foiapost/2001foiapost2.htm.

that those requests should be fulfilled. *See* H.R. Rep. No. 104-795, at 21 (1996) ("Since not all individuals . . . are near agency public reading rooms, requestors would still be able to access previously-released FOIA records through the normal FOIA process."), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3464; *see also Congress Enacts FOIA Amendment,* FOIA Update (Department of Justice, Washington, D.C.) 1996, Vol. 17, http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page1.htm; *Amendment Implementation Guidance,* FOIA Update (Department of Justice, Washington, D.C.) 1997, Vol. XVIII, No. 1, http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_1/page3.htm.

Although there are records in government files that may generate numerous inquiries from the public, it is rare that all of the FOIA requesters will have the same interest in the records. Indeed, the same collection of records may serve several purposes all at once. Historians may be seeking to document important events. Advocacy groups may seek to bring affirmative litigation or to advance legislative goals. Reporters may seek to inform the public about recent events or to cast a new light on historical events. An individual may be trying to establish entitlement to benefits or to advance private interests. Businesses might seek the records to pursue commercial opportunities. Requesters with each of these motivations and more can be found among the individuals who are responsible for surges of requests for records concerning Hurricane Katrina, the Iraq war and reconstruction effort, and other significant matters.

For these reasons, the denial of records pursuant to a FOIA request does not on its own provide the incentive for the requester to pursue the records through litigation. Nor does it provide the incentive to protect another FOIA requester's interest in the records, which may stem from different reasons for requesting the records.

Similarly, the release of records to one FOIA requester does not provide any guarantee that the record will be made available with immediacy to other members of the public. Government agencies do not systematically make released records available to the general public.[3] In addition, even FOIA requesters who intend to disseminate records may not do so immediately, and those who do not want the record shared will not inform others of the release. Thus, the release of records under FOIA typically serves only the purpose of the individual FOIA requester who received the record.

---

[3] The "frequently requested records" requirement only applies when there are three or more requests for the *same* record or when the agency anticipates that there will be at least three requests for a given record, and thus does not require any dissemination of released records that fail to meet that standard. Department of Justice, *Freedom of Information Act Guide* 29-30 (2007), http://www.usdoj.gov/oip/foia_guide07/foia_rrws.pdf. In addition, a study by *amicus* National Security Archive determined that agencies have substantially failed to comply with that provision of the FOIA. National Security Archive, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent* (Mar. 12, 2007), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm.

Indeed, the "public" purpose of FOIA is achieved through the efforts of many individual members of the public, journalists, and organizations who seek records for any of a wide range of individual reasons. This is the reason why FOIA does not distinguish between requesters or their purposes in seeking records. The gradual and consistent opening of public records pursuant to FOIA requests from diverse sources and FOIA litigation keeps federal agencies on notice that they cannot hide their activities. It provides countervailing pressure against the natural bureaucratic tendency to keep secrets.

Thus, under no circumstances will one lawsuit achieve the public purpose that is served by FOIA. A record released to one requester neither ensures that other members of the public will see that record, nor guarantees that another individual will get a record through his or her own FOIA request. Thus, a lawsuit brought under FOIA cannot be characterized as a "public action that has only an indirect impact on [the individual party's] interests." *Tyrus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) (quoting *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 803 (1996)). The FOIA request and the FOIA lawsuit are, instead, specifically associated with the interests of the individual FOIA requester.

Nor, indeed, are FOIA cases the type in which "the number of plaintiffs with standing is potentially limitless." *Tyrus*, 93 F.3d at 456 (voting rights case in which plaintiffs alleged redistricting diluted their vote). A FOIA dispute does not arise because of some

action that the government has taken that impacts the public generally. FOIA requires requesters to take a number of deliberate steps, including filing a proper request that "reasonably describes" the records sought, 5 U.S.C. § 552(a)(3)(A), in some circumstances agreeing to pay fees prior to processing, § 552(a)(4)(A)(v), paying fees for processing, § 552(a)(3)(A), and exhausting administrative remedies by filing an administrative appeal, *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990), before the dispute would ever become ripe for litigation. The vast majority of FOIA requesters go no further than filing an initial FOIA request, paying for its processing, and obtaining responsive records. Thus, the FOIA context is not like the situations in which the analysis of virtual representation was impacted by the "public law" context. *Cf. Tyrus*, 93 F.3d at 456.

In particular, the concept of adequate representation in a FOIA case by another party seeking the same records is extremely questionable. First, the perspective of the FOIA requester influences the arguments that he or she makes for release of records in several ways. In cases raising privacy issues, the identity of the requester may affect whether a court would find a "clearly unwarranted invasion of privacy" under Exemption 6 or an "unwarranted invasion of privacy" under Exemption 7(C) of the FOIA. 5 U.S.C. §§ 552(b)(6) and (b)(7)(C). The purpose for which the record is sought also is relevant under the privacy exemptions because it informs the court's evaluation of the public interest served by the requested release. In a different

way, the purpose for which a request is sought might be used to support an argument that an overburdened agency should nonetheless handle a request out of turn or grant expedited processing to a particular requester. *See Open Am. v. Watergate Special Prosecution Force,* 547 F.2d 605, 615-16 (D.C. Cir. 1976) (recognizing situations of exception need or urgency for records); § 552(a)(6)(E) (expedited processing provision). The knowledge base of any particular requester litigating a case also may vary widely. A subject matter expert or historian may be more able to marshal facts about what already is in the public record on a particular issue, while an individual with a more personal purpose may be able to provide facts that are particular to that individual.

Second, the timing of the suit may directly affect the releasability of records. FOIA policy changes over time, as illustrated by the different policy memoranda issued by Attorney General Reno and Attorney General Ashcroft. *See New Attorney General FOIA Memorandum Issued*, FOIA Post (Department of Justice, Washington, D.C.), Oct. 15, 2001, http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm. Thus, government agencies may change their policy with respect to making discretionary releases under the FOIA. The application of exemptions also changes over time. For example, a record classified under Executive Order 12,958 one day may be declassified a year later. *See* Exec. Order No. 12,958 (as amended by Exec. Order No. 13,292), 68 Fed. Reg. 15315 (Mar. 25, 2003). Similarly, a law enforcement investigation

may end, rendering records about the investigation newly releasable.

In addition, the court below also cast its net far too wide as it examined the contours of the relationship between two litigants for the purpose of virtual representation. It is not uncommon for people who seek U.S. Government records to communicate with each other. This is particularly true among the FOIA bar, which is not large. FOIA requesters from public interest, academic or journalism perspectives, who are not attorneys themselves, often seek legal assistance from a small community of FOIA advocates, just as other litigants seek experienced attorneys who are best able to pursue their cases. The choice of attorney should not be held against the FOIA requester who chooses to enforce his or her rights in court.

Moreover, as the courts have long recognized, FOIA disputes are heavily weighted towards the government, which has access to all the information about the records in dispute while the FOIA requester has none. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) ("In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought. . . . [O]nly one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information.") Thus, individuals and attorneys who pursue litigation in FOIA matters regularly share ideas and information in an effort to better

advocate for release of records in response to their requests. As for any specialized legal bar, there are electronic list serves, newsletters, conferences, academic centers at universities, and informal gatherings that provide fora for the discussion of cases and issues. Participants in these activities exchange information, advice, and ideas, just as all lawyers, journalists, academics, and individuals do when they participate in other professional associations, or through networking and educational programs. They are not "mere strangers," yet those relationships do not alter the purposes of the individual requestors seeking records. Thus, the Court should use extreme care before attributing any form of privity to those relationships.

Against this background, the decision below, which excluded evidentiary submissions and legal arguments for procedural and timing reasons, *see Taylor v. Sturgell*, 490 F.3d 965, 972-73, 975 and notes (D.C. Cir. 2007), should be viewed with significant skepticism.[4] In addition to casting doubt on the propriety of the decision below, the reasoning below should cause the Court to be extremely wary of

---

[4] Similarly, in *Herrick v. Garvey*, 298 F.3d 1184, 1194 and n. 10 (10th Cir. 2002), the case that was relied on as a basis for dismissal of Petitioner's lawsuit, the timing of the plaintiff's legal arguments led to the anomalous result that the court concluded the records in dispute had lost their FOIA Exemption 4 protection, but nonetheless would not be released because of assumptions about the result of two legal questions that the plaintiff had not raised or had not raised in a timely manner.

establishing rules that overturn the "deep-rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U.S. at 798 (citation omitted). In FOIA cases, the important concerns behind the law, the strong need for individual enforcement of the law, and the diverse incentives for members of the public to seek records should counsel against a court finding that it is a "type" of case in which a theory of virtual representation is appropriate.

CONCLUSION

The decision of the D.C. Circuit should be reversed.

Date: February 27, 2008

Respectfully submitted,

MEREDITH FUCHS
General Counsel
THE NATIONAL SECURITY ARCHIVE
GEORGE WASHINGTON UNIVERSITY
Gelman Library, Suite 701
2130 H Street, NW
Washington, DC 20037
202-994-7000

Attorney for Amici Curiae

AMICUS CURIAE BRIEF

No. 07-371

In The
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARK L. SHURTLEFF
Utah Attorney General
PHILIP S. LOTT*
PEGGY E. STONE
Assistant Utah Attorneys General
**Counsel of Record*
OFFICE OF THE ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

[illegible]

BEST AVAILABLE COPY

QUESTION PRESENTED

Can a person be bound by a judgment to which he was not a party if his identical interests were adequately represented in the prior action by a party with whom he shares a close, but nonlegal, relationship?

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Summary of the Argument	4
Argument	5
I. There is already a "privity" exception to the general due process principle that everyone should have his own day in Court	5
II. Privity exists when a later litigant has: (A) Interests identical to those of a party to the prior case that were adequately represented; and (B) an affirmative link with the prior party or the prior case	8
III. Less process is due when the interests at stake are in the nature of public, not private, interests	10
IV. A legal relationship between prior and later litigants is not always required by due process before preclusion can apply	13
V. Notice is not an absolute due process requirement	15
Conclusion	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Besinga v. United States, 923 F.2d 133 (9th Cir. 1991) 16

Bigman v. Utah Navajo Dev. Council, Inc., No. C-77-0031 (D. Utah 1977) 1, 17

Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994) 16

Bruszewski v. United States, 181 F.2d 419 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950) 8

Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343 (2nd Cir. 1995) 13

Coryell v. Phipps, 317 U.S. 406 (1943) 8

Crawford v. Honig, 37 F.3d 485 (9th Cir. 1994) 16

E.E.O.C. v. Gen. Tele. Co., 599 F.2d 322 (9th Cir. 1979), *aff'd*, 446 U.S. 318 (1980) 16

E.E.O.C. v. Pemco Aeroplex, Inc., 383 F.3d 1280 (11th Cir. 2004) 13

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 6

Goldberg v. Kelly, 397 U.S. 254 (1970) 10

Gonzalez v. Banco Cent. Corp., 27 F.3d 751 (1st Cir. 1994) 7

Gustafson v. Johns, 213 Fed. Appx. 872 (11th Cir. 2007) 14

TABLE OF AUTHORITIES – Continued

Page

Headwaters, Inc. v. U.S. Forest Serv., 399 F.3d 1047 (9th Cir. 2005) 17

Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980) 17

Jaffree v. Wallace, 837 F.2d 1461 (11th Cir. 1988) 14

Jim v. State of Utah, No. C-21-70 (D. Utah 1970) 1

Johnson v. Gen. Motors Corp., 598 F.2d 432 (5th Cir. 1979) 16

Martin v. Wilks, 490 U.S. 755 (1989) 3, 6, 7 9

Mathews v. Eldridge, 424 U.S. 319 (1976) 10

Montana v. United States, 440 U.S. 147 (1979) 6

Nevada v. United States, 463 U.S. 110 (1983) 7

Norris v. Slothouber, 718 F.2d 1116 (D.C. Cir. 1983) (per curiam) 16

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 6, 17

Pelt v. State of Utah, No. 2:92-CV-639 (1992) 1

Pelt v. State of Utah, No. 104 F.3d 1534 (10th Cir. 1996) 1, 2

Pelt v. State of Utah, 2006 WL 1148818 (D. Utah 2006) 3

Petit v. City of Chicago, 766 F. Supp. 607 (N.D.Ill.1991) 15

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 17

TABLE OF AUTHORITIES – Continued

Page

Richards v. Jefferson County, 517 U.S. 793 (1996) ..... *passim*

Sakezzie v. Utah State Indian Affairs Comm'n, 198 F. Supp. 218 (D. Utah 1961) 1

Sakezzie v. Utah State Indian Affairs Comm'n, 215 F. Supp. 12 (D. Utah 1963) 1

Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84 (5th Cir. 1977) 9

Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) 8, 9, 12, 13, 15

United States v. Jim, 409 U.S. 80 (1972) 2, 11

Wilkinson v. Austin, 545 U.S. 209 (2005) 10

INTEREST OF THE AMICUS CURIAE

The State of Utah files this brief amicus curiae[1] in support of respondents simply to provide a live example from a category of lawsuits – public law actions – in which a subsequent litigant should be bound by the judgment in a prior case, notwithstanding the lack of a legal relationship between the litigants or a lack of notice. *See* Fed. Respt.'s Br. at 18, 26-33.

Utah is currently defending the fourth in a series of nearly continuous lawsuits that began in 1961.[2] Each of the four lawsuits attacked Utah's administration of an oil and gas royalty fund, which federal law requires Utah to administer as trustee for Navajos who reside in San Juan County, Utah. *Pelt v. State of Utah*, 104 F.3d 1534, 1544 (10th Cir. 1996). Each of the four lawsuits, which have been litigated in 39 of the last 47 years, was brought against Utah as the fund's trustee by San Juan County Navajos, fund beneficiaries whom this Court has already held have no individual, constitutionally-protected property

---

[1] The brief is submitted by the Utah Attorney General on behalf of the State of Utah, pursuant to Sup. Ct. R. 37.4.

[2] *Sakezzie v. Utah State Indian Affairs Comm'n*, 198 F. Supp. 218 (D. Utah 1961); *Sakezzie v. Utah State Indian Affairs Comm'n*, 215 F. Supp. 12 (D. Utah 1963); *Jim v. State of Utah*, No. C-21-70 (D. Utah 1970); *Bigman v. Utah Navajo Dev. Council, Inc.*, No. C-77-0031 (D. Utah 1977); *Pelt v. State of Utah*, No. 2:92cv639 (D. Utah 1992).

rights in the royalty fund. *See United States v. Jim*, 409 U.S. 80, 82 (1972).

The first two lawsuits against Utah were prosecuted as class actions; the second was certified as such under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which does not mandate notice to class members or an opt-out provision. The third lawsuit, although necessarily prosecuted by the plaintiff San Juan County Navajos in their capacity as beneficiaries of the royalty fund, was never formally certified as a class action.

The current lawsuit, *Pelt v. State of Utah*, seeks another accounting of the royalty fund's administration all the way back to 1959, when oil and gas royalties were first paid. In this federal suit, certified as a class action under Rule 23(b)(2), Utah has sought to limit the scope of the accounting claim to the years after 1989, the last year addressed in the third accounting action brought by fund beneficiaries. Utah has argued that the claims for an accounting for years before 1989 are barred by res judicata, based on the *Pelt* plaintiffs' "virtual representation" in the three prior lawsuits brought by other fund beneficiaries concerning administration of the trust before that year.

The federal district court concluded that each of the earlier lawsuits involved the same cause of action and resulted in final judgments on the merits, but that the *Pelt* plaintiffs are not bound by the earlier judgments due to lack of privity. With regard to the

third lawsuit, the district court reasoned that there was not "adequate representation," required by *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989), because there was no "legal relationship or other form of accountability" between the *Pelt* plaintiffs and the prior plaintiffs, although all are co-beneficiaries of the royalty fund. *Pelt v. State of Utah*, 2006 WL 1148818 at *2, *9-14. As a result, Utah must once again account for royalty fund receipts and disbursements made, or not made, nearly fifty years ago. This decision is currently under advisement on interlocutory appeal to the United States Court of Appeals for the Tenth Circuit,[1] which has issued an order abating further action pending this Court's decision in the instant case.

Petitioner Taylor argues the view adopted by the district court in *Pelt*: a non-party to prior litigation can only be precluded from relitigating issues already decided if there is a relationship involving legal accountability between the non-party and the party in the prior action. Petr.'s Br. at 9-19. In Taylor's view, the public nature of the case does not and cannot alter this requirement. *Id.* at 30-32. And even if due process requires no legal relationship for preclusion, Taylor argues, the later non-party's claim can never be precluded, consistent with due process strictures,

---

[1] *Pelt v. State of Utah*, Tenth Circuit Nos. 06-4046, 06-4164 (argued March 7, 2007).

unless he or she has had notice of the prior action. *Id.* at 33-36.

Utah's experience as a repeat class action defendant involving the same accounting claim provides a graphic example of the burdens of successive litigation on the same public law issues by those with identical interests, but without the formal legal relationship Taylor urges as the *sine qua non* of claim preclusion through "virtual representation." Along with all states, frequent defendants in public law cases, Utah has an important interest in the Court's recognition of virtual representation as a bar to relitigation of public law issues if the later plaintiffs' interests were adequately represented in a prior suit by one with the same interests and a close, though not necessarily legal, relationship.

SUMMARY OF THE ARGUMENT

It is a fixture of this Court's res judicata jurisprudence that a litigant who is in privity with a party to earlier litigation is bound by the earlier judgment even though the litigant was not a party in the prior action. Determining whether there is privity between the two litigants is not formulaic; it requires a fact-intensive, functional inquiry. The D.C. Circuit has fashioned an appropriate and workable mode of analysis that asks: Are the interests of the two litigants identical? Was that interest adequately represented by the party in the first action? And is there

an affirmative link between the subsequent litigant and the prior litigant or the prior case?

This approach serves the important goals of res judicata – finality and conservation of judicial resources – but also protects the due process rights of subsequent litigants when appropriate. It also recognizes that a strict requirement of legal accountability between the litigants encourages endless relitigation of the same issues and rewards collusive litigants.

Like privity, due process is a flexible concept that varies, depending on the nature of the interests at stake. Less process is due litigants whose public interests, not private rights, are on the line. In that circumstance, mandatory notice to all individuals as a condition of claim preclusion – impossible in many instances - exceeds due process requirements and promotes similar kinds of litigation mischief.

For these reasons, Utah urges the Court to reject the rigid privity test advocated by Petitioner Taylor and to adopt instead the D.C. Circuit's functional privity analysis.

ARGUMENT

I. THERE IS ALREADY A "PRIVITY" EXCEPTION TO THE GENERAL DUE PROCESS PRINCIPLE THAT EVERYONE SHOULD HAVE HIS OWN DAY IN COURT.

Generally, "one is not bound by a judgment *in personam* in a litigation in which he is not designated

as a party or to which he has not been made a party by service of process." . . . it being "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) and *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (other citations omitted)). Competing with this due process principle is the "fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata. . . . that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . .'" *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)).

This precept of finality in litigation "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate[,] protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54. This Court has stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." *Federated Dep't Stores, Inc. v. Moitie*, 452

U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)).

In *Nevada v. United States*, 463 U.S. 110 (1983), this Court addressed the scope of finality enforced through the doctrine of res judicata, holding that once a final judgment is entered, the case is final, not only as to the parties, but also as to privies of the parties. *Id.* at 129-30. Both are precluded from relitigating any claim that was or could have been litigated. *Id.*[1] This Court has, thus, recognized an exception to the general due process rule that everyone should have his own day in court "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

In *Richards*, this Court explained that this privity exception applies "when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Id.* at 798-99; *see also Martin*, 490 U.S. at 762 n.2 (citing *Hansberry*, 311 U.S. at 41-42, and Fed. R. Civ. P. 23) ("adequate

---

[1] The First Circuit Court of Appeals has correctly noted: "Logic suggests that the doctrine can achieve its goals only if its preclusive effects occasionally can reach persons who, technically, were not parties to the original action." *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 757 (1st Cir. 1994). "The pitfalls of a more mechanical rule are obvious: making party status a *sine qua non* for the operation of res judicata opens the door to countless varieties of manipulation, including claim-splitting, suits by proxy, and forum-shopping." *Id.*

representation" exception applies in "class" or "representative" suits). The *Richards* court did not define "privity," but stated that the term "is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards*, 517 U.S. at 798 (citing Restatement (Second) of Judgments, ch. 4 (1980) (Parties and Other Persons Affected by Judgments)). Privity, in other words, describes one who is close enough to another to be bound by the other's judgment. *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950). Privity "turns on the facts of particular cases." *Coryell v. Phipps*, 317 U.S. 406, 411 (1943). It is a flexible concept that takes many factors into consideration, not a rigid rule, as Petitioner argues.

II. PRIVITY EXISTS WHEN A LATER LITIGANT HAS: (A) INTERESTS IDENTICAL TO THOSE OF A PARTY TO THE PRIOR CASE THAT WERE ADEQUATELY REPRESENTED; AND (B) AN AFFIRMATIVE LINK WITH THE PRIOR PARTY OR THE PRIOR CASE.

In *Taylor*, the D.C. Circuit identified appropriate factors to be analyzed in deciding whether a subsequent litigant is in privity with a party to a prior case. The court observed that "[c]ourts now generally hold a nonparty's claim precluded by a prior suit based upon a particular form of privity known as 'virtual representation' . . . [t]he idea [being] that

some cases of successive litigation involve as a litigant 'a nonparty [to the original action] whose interests were adequately represented by a party to the original action.'" *Taylor v. Blakey*, 490 F.3d 965, 970 (D.C. Cir. 2007) (quoting *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996)); *see also Martin*, 490 U.S. at 762 n.2 ("in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party"). The *Taylor* Court's functional approach will work to preclude relitigation, but will also "prevent preclusion when the relationship between the party and non-party becomes too attenuated." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977).

The D.C. Circuit acknowledged that *Richards* requires identical interests and adequate representation as preconditions for virtual representation, but added that "there can be no virtual representation absent an affirmative link between the later litigant and either the prior party or the prior case." *Taylor*, 490 F.3d at 971-72. This affirmative link must be "a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.* at 972. The court of appeals recognized that "[t]o find virtual representation under only very narrow circumstances . . . would expose defendants to the burden of relitigation, raise the possibility of inconsistent results, and

compromise the public interest in judicial economy." *Id.* at 971. The D.C. Circuit's privity test is a flexible test that appropriately balances the competing concerns of due process with those of finality in litigation. The court of appeals' decision should be affirmed.

III. LESS PROCESS IS DUE WHEN THE INTERESTS AT STAKE ARE IN THE NATURE OF PUBLIC, NOT PRIVATE, INTERESTS.

The nature of the interests at stake is a significant factor to be considered in determining what process is due. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). It is well settled that the process due depends upon the nature of the claimed loss or interest at stake. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 225 (2005); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

In *Richards*, this Court considered the nature of the interests at stake and distinguished two types of actions ("public" and "private") brought by taxpayers, i.e., "one category . . . in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds . . . or about other public

action that has only an indirect impact on his interests" and "another category of taxpayer cases in which the [taxpayer is] . . . presenting a federal constitutional challenge to a State's attempt to levy personal funds." *Richards*, 517 U.S. at 803.

As to the latter category, where "personal funds" were involved, this Court held that the privity exception to the general due process rule did not apply. *Id.* In those actions not involving personal property rights, however, this Court assumed that the States "have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Id.*; *see also* 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4457, at 548 (2d ed. 2002) (noting virtual representation is more readily found in public law cases, because "[r]esolution of public issues has only an indirect impact on individual interests, and there is a potentially limitless supply of plaintiffs."). Less process is, thus, due when the interests at stake are not constitutionally-protected rights or are in the nature of public interests.

Like class action plaintiffs in decades-long institutional reform cases, the *Pelt* plaintiffs have identical interests in the outcome of their trust action. This Court has, however, already determined that the class members have no individual or collective, constitutionally-protected property rights in the fund. *United States v. Jim*, 409 U.S. 80, 82-83 (1972). The class members share a close relationship in that they

are all beneficiaries of the same fund, each with the same undivided, equitable interest in the fund. Further, because no beneficiary has a constitutionally-protected property right in the fund, no individual remedy favoring one beneficiary over another can be obtained. The only remedy obtainable is one that benefits all members of the class, so their interests are perfectly aligned. As a result, all past, present, and future fund beneficiaries share the same incentive to litigate. This guarantees that their interests will be closely aligned and that virtual representation will satisfy due process concerns. *See Tyus*, 93 F.3d at 454.

The unrebutted facts in *Taylor* demonstrate a similar alignment of interests. The D.C. Circuit determined that they showed Herrick and Taylor are more than just two people with a fondness for old airplanes who happened to want release of the same documents and belong to the same association. *Taylor*, 490 F.3d at 972-73, 975. The court of appeals concluded Herrick was Taylor's virtual representative in the prior litigation because the two have identical interests, with the same incentive to litigate, and they are "close associate[s,]" in a "close relationship." *Id.* at 974-75.

When, as in *Taylor* and in Utah's royalty fund litigation, the litigants do not hold individual (or even collective) property rights, their interests are public interests. In such actions, "due process concerns are lessened" and "courts have 'wide latitude to establish procedures . . . to limit the number of

judicial proceedings. . . .'" *Tyus*, 93 F.3d at 456 (quoting *Richards*, 517 U.S. at 794).

IV. A LEGAL RELATIONSHIP BETWEEN PRIOR AND LATER LITIGANTS IS NOT ALWAYS REQUIRED BY DUE PROCESS BEFORE PRECLUSION CAN APPLY.

The *Taylor* court concluded that a relationship need not be a "legal relationship" to qualify as a "close relationship" for res judicata privity purposes: "Whether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question." *Taylor*, 490 F.3d at 975. The court of appeals' holding comports with this Court's observation in *Richards* that "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards*, 517 U.S. at 798. It is also consistent with the rule adopted by the Second Circuit: "Whether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995).

Likewise, though the Eleventh Circuit considers the existence of a legal relationship as one factor in its virtual representation analysis, *see E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287 (11th Cir.

2004), it does not consider a legal relationship an absolute requirement in all cases. *See, e.g., Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (discussing relevant factors in virtual representation analysis and finding privity in the absence of a legal relationship). More recently, in *Gustafson v. Johns*, 213 Fed. Appx. 872, 876 (11th Cir. 2007), the Eleventh Circuit noted that this Court, in *Richards*, had "distinguished between private causes of action and 'other public action that has only an indirect impact on [a plaintiff's] interests.'" *Id.* Relying upon this distinction between public law and private law cases, the Eleventh Circuit held that, in cases when public law interests are at stake, a plaintiff need not have legal accountability to a plaintiff in a subsequent lawsuit for virtual representation to apply. *Id.*

States are involved in an endless array of public interest lawsuits, such as taxpayer lawsuits, lawsuits by prison inmates challenging prison conditions, lawsuits by mental hospital patients challenging hospital conditions, and lawsuits challenging states' child and family services programs. In these public interest lawsuits, prior litigants have no relationship of legal accountability to subsequent litigants. Some of these lawsuits are prosecuted as class actions, while others are not. In many instances, it is impossible to know who all potential class members are now or who class members may be in the future. For instance, in the context of an institutional reform lawsuit, it is impossible to know who will be a future inmate or mental hospital patient.

To require a legal relationship between prior and subsequent litigants and notice to absent class members would be to open the door to endless litigation. Where public interests are at stake, res judicata rules should not encourage "fence sitting" or allow the bringing of repeat, "separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the entire group." *Tyus*, 93 F.3d at 457. The failure to apply preclusion protection in this context, where "nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost . . . entails a significant cost to the judicial system and 'discourage[s] the principles and polices [sic] the doctrine of res judicata was designed to promote.'" *Id.* at 456-57 (quoting *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D.Ill.1991)).

V. NOTICE IS NOT AN ABSOLUTE DUE PROCESS REQUIREMENT.

As the *Taylor* court recognized, while "[n]otice is ordinarily a key element of due process . . . it is neither a sufficient nor a necessary condition of adequate representation." 490 F.3d at 973 (internal citation omitted). If it were, the court of appeals observed, a nonparty "with identical interests, could relitigate a claim that was zealously but unsuccessfully tried to judgment . . . even if [had the nonparty] received notice of and intervened in the prior case, [he] would have proceeded in the same way." *Id.* at 973-74.

Notice is not an absolute due process prerequsite in a class action certified under Rule 23(b)(2) in order for res judicata to apply. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994); *E.E.O.C. v. Gen. Tele. Co.*, 599 F.2d 322, 324 (9th Cir. 1979), *aff'd*, 446 U.S. 318 (1980); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 433, 434 (5th Cir. 1979); *accord Norris v. Slothouber*, 718 F.2d 1116 (D.C. Cir. 1983) (per curiam). Class actions, like Utah's royalty fund litigation, that do not involve protected interests are certified under Rule 23(b)(2). "When an action is certified under Rule 23(b)(2), . . . absent class members are not required to receive notice or to have the opportunity to opt-out of the suit." *E.E.O.C.*, 599 F.2d at 334. In a Rule 23(b)(2) class action, "[d]ue process requires only that the class members be adequately represented." *Id.*; *see also Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994); *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991). As these cases show, notice is not an absolute due process requirement when no constitutionally-protected property rights are at stake.

In contrast, when constitutionally-protected individual property rights are at stake, the process required to bind absent class members includes adequate notice to absent class members, adequate representation, and an opportunity for the members

to opt out of the suit. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812-14 (1985).[7]

In Utah's decades of royalty fund litigation, only one prior lawsuit was not certified as a class action, *Bigman v. Utah Navajo Dev. Council, Inc.*, though it was prosecuted as one.[8] *See* note 2, *supra*. But in all these cases, there was no possible personal recovery or individual benefit obtainable by the named San Juan County Navajo plaintiffs. Instead, all were necessarily aimed at benefitting the San Juan County Navajo class as a whole. And just as in most institutional reform class actions litigated under Rule 23(b)(2), notice to future class members – who are unknown and unknowable – is not only unnecessary to satisfy due process, it is impossible.

---

[7] The procedural protections required to bind class members have been required by this Court only when the class members' claims were "wholly or predominately for money judgments." *Ortiz*, 527 U.S. at 848 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811, n.3 (1985)). This Court has not extended the same procedural protections to cases where no individual, protected property rights are at stake.

[8] In *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980), the Ninth Circuit reviewed the res judicata effect of a case that was "treated by the trial court as a class action" but was never certified. The Court stated that to not consider the case as a class action "would elevate form over substance." *Id.* at 1126, n.7. *But see Headwaters, Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1056, n.8 (9th Cir. 2005) (noting "it is not clear that *Jackson* is still good law after *Richards*").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARK L. SHURTLEFF
Utah Attorney General
PHILIP S. LOTT*
PEGGY E. STONE
Assistant Utah Attorneys General
Counsel of Record